CERTIFICATE.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1895.

No. 144 /53.

H. M. BEDFORD AND LOU M. BEDFORD, HIS WIFE,

vs.

THE EASTERN BUILDING AND LOAN ASSOCIATION.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

FILED NOVEMBER 20, 1895.

(17,558.)

(17,558.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

No. 444.

H. M. BEDFORD AND LOU M. BEDFORD, HIS WIFE,

vs.

THE EASTERN BUILDING AND LOAN ASSOCIATION.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., DECEMBER 14, 1899.

1 United States Circuit Court of Appeals, Sixth Circuit.

H. M. Bedford and Lou M. Bedford, His Wife, v. Eastern Building and Loan Association of Syracuse, N. Y.	No. 637. Appeal from the United States Circuit Court for the Western Division of Tennessee.

Submitted March 15, 1899; decided July 5, 1899.

Before Taft and Lurton, circuit judges, and Thompson, district judge.

The Eastern Building and Loan Association of Syracuse, N. Y., is a corporation organized under the laws of the State of New York for the purpose and with the power of conducting a general building association business in New York and other States. Its plan of organization is similar to that generally adopted by such associations. Subscribers to its stock pay $1 initiation fee for each share of $100 and 75 cents per month as dues on each share and certain fines on default, and when the whole amount of dues and dividends paid in amount to $100, the holder is entitled to withdraw the same. Borrowing members receive par value of their shares in advance and secure their compliance with requirements as to dues, fines and interest by mortgage or otherwise. Prior to March 26, 1891, the association had a soliciting agent in Memphis, Tennessee, whose duty it was to solicit persons to become members of the association and to subscribe to its stock. The agent had no authority to accept applications for membership or subscriptions for stock but only the authority to transmit them by mail to the office of the company in Syracuse, New York, where they were accepted or rejected by the board of directors of the association.

2 Three months after a person had subscribed for stock, and the stock had been issued to him, he was, by the by-laws of the association, permitted to apply for an advance of the nominal par value of his shares or, in effect, a loan. This application was forwarded through the soliciting agent to the company at Syracuse together with the certificate of stock, already issued, as a pledge and a statement of the value of the property which it was proposed to mortgage to secure the loan. The application was accompanied by a recommendation of what was called "the local board" in regard to the wisdom of the loan. The local board consisted of certain stockholders of the association living at the applicant's place of residence who had been elected by all the resident stockholders, and whose duty it was to advise the association at Syracuse concerning the value of the property offered and the character of the applicant. The local board had officers, one of whom was a treasurer through whom members might, if they desired, forward payments due to the association at Syracuse, but the by-laws stated that in so doing the local treasurer was acting as agent for the stockholders and not

for the association. Another by law provided that all payments should be made to the secretary of the association at the home office in registered letter, express or money order or drafts.

On the second day of January, A. D. 1891, H. L. Bedford, a resident and citizen of Shelby county, Tennessee, made the following application to the association which he delivered to its soliciting agent at Memphis to be forwarded to Syracuse:

O. K. Supt.	Cashier.	Stock.	A. F. 1-26-91. Recorded.	Indexed.	Filed.	Mailed.

46 Shares.	Application for shares	Number 4773.

in the

Eastern Building and Loan Association

of Syracuse, N. Y.

Agent, J. H. T. Martin.

I, H. L. Bedford, of Bailey, county of Shelby, State of Tennessee, No. of street or P. O. box —; occupation, farmer; hereby apply for membership in the Eastern Building and Loan Association of Syracuse, Onondaga county, New York, and subscribe for 46 shares of installment stock.

3 I hereby agree to abide by all the terms, conditions and by-laws contained or referred to in the certificate of shares, and will also comply with all the rules and regulations of said association, and do also hereby, in order to facilitate the transaction of business of the Eastern Building and Loan Association of Syracuse, N. Y., make, constitute and appoint the secretary of said association for me, in my name, place and stead, to appear and vote as my proxy upon any and all shares of stock at any time held by me, or standing in my name in said association during my absence, at any and all meetings of stockholders or directors and upon any and all matters which may properly come before any such meetings and attorneys, one or more under him, from time to time in writing to appoint, hereby authorizing, ratifying and confirming all that any said attorney, or his substitute, may do, or cause to be done as such proxy by virtue hereof. This proxy is not in any manner to affect my right to vote on all such stock whenever I am personally present at any stockholders' meeting.

In witness whereof I have hereunto set my hand and affixed my seal this 2d day of Jan'y, A. D. 1891.

Signature of applicant: H. L. BEDFORD. [SEAL.]

H. B. MARTIN, *Witness.*

The price of stock must accompany this application.

Endorsed.

Instructions to Agents.

This application should always be written in ink. All blank places should be filled correctly and plain to avoid any chance of error in the home office. Be particularly careful to have the name of applicant written plain and spelled correctly, and where there appears any possible chance for misreading any word. Agents should use the space at the bottom of application for explanation. The admission fee must accompany the application before the stock can be written at the home office.

Send certificate of shares to:

Name.....

P. O.....

County..... State.....

On the 2d of February, 1891, the certificate of stock was issued by the association and sent to its soliciting agent at Memphis who, a few days later, handed it to Bedford. The certificate was in the words following:

Series No. B. 2, maturing August 1st, 1897, Eastern Building and Loan Association of Syracuse, N. Y.

Certificate number.	Number of shares.	Amount.
4773	46	$4,600

4 This certifies that H. L. Bedford, of Bailey, county of Shelby and State of Tennessee, is hereby constituted a shareholder of the Eastern Building and Loan Association of Syracuse, New York, incorporated under the laws of the State of New York and holds forty-six shares therein of one hundred dollars each, and in consideration of the membership fee, together with agreement and statements contained in the application for membership in the association, and full compliance with the terms, conditions and by-laws printed on the front and back of this certificate, which are hereby referred to and made a part of this contract, and the said Eastern Building and Loan Association of Syracuse, New York, agree to pay said shareholder or his heirs, executors, administrators or assigns the sum of one hundred dollars for each of said shares at the end of seventy-eight months from the date hereof or in case of his death prior to the expiration of seventy-eight months, the association will pay the sum of all monthly installments paid on this certificate with interest at 6 per cent. per annum, payable in the manner and upon the conditions set forth in said terms, conditions and by-laws hereto attached. All payments under this certificate are payable at home office of the association at Syracuse, New York, within sixty days after the acceptance and approval of satisfactory proofs. This certificate of shares is issued to and accepted by the holder thereof upon the following express terms and conditions:

First. The shareholder agrees to pay or cause to be paid, a monthly installment of seventy five cents on each share named in this contract, the same to be paid on or before the last Saturday of each month until such share matures or is withdrawn.

Second. If the shareholder shall fail to pay or cause to be paid any monthly installment on or before the last Saturday of each month, he shall pay a fine of ten cents per share for each and every month the payment may be in arrears.

Third. Stock in this association is non-forfeitable; but if a monthly payment on any share becomes past due and payable for a period of six months or more, such share shall be sold at auction for the purpose of paying the arrearages. The proceeds of the sale shall first be used to pay all back monthly payments and fines; the balance remaining after paying all accrued fines and monthly payments shall be paid to the member in whose name the stock stands at the time of sale. If the stock brings no more than enough to pay the accrued fines and monthly payments it shall be bid in by the association and canceled, and the amount standing to the credit thereof in the loan fund shall be divided among the other shares as profits.

Fourth. Members may withdraw their monthly installments at any time by first giving thirty days' notice, and will receive 6 per cent. annual interest on all shares of six months' standing and up to two years; the third year's 7 per cent.; any time after the third year and before maturity 8 per cent.

Fifth. If a shareholder dies his personal representative may withdraw his shares at any time or continue on to maturity.

Sixth. At stated periods the profits arising from interest, premiums, fines and other sources, shall be apportioned among the shares in good standing.

Seventh. All payments must be paid to an authorized agent, or sent to the secretary at the home office by draft, express or money order, or registered letter. Individual drafts or checks not receivable.

Eighth. The association reserves the right at any time to make an investigation in all cases prior to the approval of claims.

Ninth. The by-laws of this association, which are attached to and indorsed hereon, are a part of this contract and such by-laws and this certificate are to be construed together as part of the contract between the association and the shareholder.

Tenth. No shares shall be assignable or transferable on the books of the association, except by the shareholder paying a transfer fee of two dollars for entering the same, and upon consent of the association, indorsed thereon by the secretary after all dues and claims on the same have been paid.

Eleventh. It is agreed by all shareholders of this association that desire loans, that all money in the loan fund shall be sold at a uniform rate of ten per cent., bid as premiums on all loans.

Twelfth. No shareholder shall have any claim to any interest in the affairs, assets or funds of this association, nor the control of

them, except as above specifically set forth, and assumes no further liability of any kind whatsoever except as hereafter described.

Thirteenth. In every case where this contract shall cease and determine, or become null and void, then all payments made thereon shall become forfeited to the association.

Fourteenth. Any action brought against this association shall be commenced within six months after filing proofs, and in the county of Onondaga and State of New York.

Fifteenth. No agent has authority to change this contract in any way, and the association assumes no obligation for any statements not contained in its printed literature.

Given under the seal of said association at Syracuse, New York, the second day of Feb'y, A. D. 1891.

H. H. LOOMIS, *President.*
[L. S.] JNO. J. W. REYNOLDS,
Secretary and Gen'l Manager.

6 Attached to this were the by-laws of which only the following are deemed material:

ARTICLE I.

SECTION 3. The principal place of business of this association shall be located at Syracuse, N. Y., but the branches or agencies may be located and business done in any part of the State of New York, or in any other State or Territory of the United States where no legal prohibition exists, by authority of the board of directors, to be evidenced by a vote of a majority of the board, and spread upon its records.

ARTICLE IV.

SECTION 1. The annual meeting of the stockholders shall be held at the home office of the association on the second Monday of May of each year commencing with the year 1891, between 2 and 4 o'clock p. m., of which due notice shall be given according to law.

ARTICLE XIX.

Contract of Members.

SECTION 1. The terms and conditions expressed in the certificate of stock, in connection with the application for membership and the by-laws of the association, form the contract between the association and each shareholder therein.

SEC. 16. All remittances for advance, installments, premiums, monthly installments, fines and penalties, interest and premiums, and all other payments, shall be made to the secretary of the association at the home office, and in registered letter, express or money order or drafts. Individual checks shall not be received.

ARTICLE XVI.

Local Boards.

SECTION 1. Whenever sufficient stock has been sold in any town to make it advisable the members residing in each town may organize a local board or branch of the association. The officers of the local organization shall consist of a board of from five to nine directors, from whose number shall be elected a president, secretary and treasurer (combined) and attorney; all of whom must be shareholders in the association; these officers shall hold office one year and until their successors are elected.

SEC. 2. The traveling agents of the association are given authority to appoint the first officers of the local board. Provided, however, that officers so appointed shall only hold office until the members of the local board meet and elect their successors.

SEC. 3. It shall be the duty of the officers of the local board to pass on all applications for loans which are received by the
7 association from members residing in the town where such local board is located, and to protect the interest of the association in all practicable ways.

SEC. 4. Members may, if they so desire, make monthly payments on stock to the local treasurer. But such local treasurer shall be deemed to be the agent of the members, and not of the association.

SEC. 5. As soon as the officers of the local board have been appointed or elected, and the names of such officers have been certified to the association by a traveling agent or by the local secretary, a local-board charter shall be issued to such board.

SEC. 6. The president of the local board shall call a meeting thereof whenever three members shall request him so to do.

On the 20th of March, 1891, Bedford made an application for a preference for an advance which was forwarded through the same soliciting agent to Syracuse. Bedford described in detail the real estate upon which he proposed to give the association a mortgage. This application was approved May 18, 1891, by the board of directors at Syracuse. Bedford then applied on June 20th for the loan in the letter following:

Application for an Advance.

To the board of directors of the Eastern Building and Loan Association of Syracuse, N. Y.

GENTLEMEN: At a regular meeting of your board, held May 18, 1891, having obtained the preference for an advance on forty-six shares of No. 1773 of your association, at a premium of ten per cent., I now respectfully request the advance be granted. I hereby agree to comply with the charter and by-laws of your association and all requirements defined by your committee of the board of directors.

H. L. BEDFORD, *Applicant.*

Witness:
J. H. T. MARTIN.

This letter was accompanied by a mortgage to the association, duly executed and acknowledged by Bedford and wife before a notary in Shelby county, Tennessee, of the land in that county previously tendered as security. The mortgage had been duly recorded in Shelby county.

The defeasance clause of the mortgage was as follows:

"This grant is intended as security for the payment of the sum of fifty-six hundred, eighty-three and $\frac{8}{100}$ dollars, the same being the principal, interest and premium of a loan from said association, which said loan was made pursuant to and accepted under the provisions of the by-laws of said association, and which said by-laws have been read by the mortgagor, H. L. Bedford, and are made a part of this contract, which said loan is evidenced and secured to be paid by seventy-eight (78) certain promissory notes of even date herewith, executed by the said H. L. Bedford, payable to the said association at its office in Syracuse as follows: One of each of said notes to be paid on or before the last Saturday of each and every month until all of said seventy-eight notes are fully paid, together with the interest, and each of said notes after maturity at the rate of six (6) per cent. per annum, payable semi-annually, until said notes are fully paid. And the said mortgagor, H. L. Bedford, for himself and his heirs, executors, administrators and assigns hereby covenants and agrees with the party of the second part, its successors and assigns to pay said principal, interest and premiums at maturity and the interest accruing on said notes after maturity and all fines and penalties that may be imposed pursuant to the provisions of the constitution and by-laws of said association, and also to keep and perform all promises and engagements made and entered into with said association according to the true intent and meaning of its by-laws and articles of association, and also to keep the buildings erected and to be erected upon said premises insured against loss or damage by fire in an amount and in such manner and in such company as shall be most satisfactory to the party of the second part, its successors or assigns, so that the loss or losses, if any, shall be payable to it or them, and from time to time when taken out issued on said premises, which policies shall contain the best and most approved form of mortgage clause. And at once to make due proofs in case of loss and do all other things required, deliver over to it or them all policies and renewals thereof by said policies, and also pay and discharge when due and payable all taxes, assessments, rates and other charges now or hereafter levied or assessed upon said premiums and remove all adverse claims, clouds and encumbrances, also that until full payment of the money hereby secured nothing shall be done or suffered whereby said premises shall be diminished in value or any of said policies of insurance affected or vitiated.

In case default shall be made in effecting such insurance or in paying, discharging or removing such taxes, assessments, rates, other charges, adverse claims, claims or encumbrances as aforesaid, it shall be lawful for said second party, its successors or assigns, to effect such insurance and pay such taxes, assessments, rates, other charges,

adverse claims, choses or emcumbrances and the amount so paid shall be a lien on said premises added to the amount secured by these presents and forthwith due and payable without demand, with interest, and may be collected in the same manner as the principal sum hereby secured. And it is hereby expressly agreed by and between the parties to these presents that if default be made in the payment of any one of said notes or any part thereof as herein provided or in case of waste or non-payment of the taxes, assessments or impositions on said premises, or in case of neglect or refusal to keep the
9 premises insured as herein provided or in case the improvements thereon shall not be kept in good condition or repair, or in case of a breach of any of the covenants or agreements contained herein, or in case of failure to duly observe and keep the by-laws of the said association and in either or any of such cases, the whole of the said principal sum, interest, premiums, fines, dues and costs, shall at once become due and payable at the option of said association, its successors or assigns, and it shall be lawful for said association or its successors or assigns at any time thereafter to sell the said premises hereby granted, or any part thereof, in the manner prescribed by law and out of the moneys arising from such sale to retain the amount due and unpaid for principal, interest, premiums, fines, dues and costs thereof, taxes, assessments, impositions, insurance and other advances, together with the costs and charges of making such sale, and the overplus, if any there be, shall be paid by the party making such sale on demand to the said H. L. Bedford, or his heirs or assigns. And this controversy shall be void if full payment of the aforesaid moneys, with principal and interest, be made as hereinbefore specified, and if the aforesaid covenants and each of them be well and truly kept and performed as herein specified and provided."

The seventy notes were all of the same tenor, *mutatis mutandis*, as the following:

On or before the last Saturday of June, 1893, I promise to pay seventy-two and $\frac{86}{100}$ dollars, $72.86, to the order of the Eastern Building and Loan Association at its office in Syracuse, N. Y. Value received. Bailey, Tenn. May 1, 1891.

H. L. BEDFORD.

The business of the association in Tennessee had been lawful down to March 26, 1891, when the following act was passed by the legislature of Tennessee:

CHAPTER 122.

An act to amend chapter 31 of the Acts of 1877, declaring the terms on which foreign corporations organized for mining or manufacturing purposes may carry on their business and purchase, hold, and convey real and personal property in this State, so as to make the provisions of said act apply to all foreign corporations that may desire to own property or to do business in this State.

SECTION 1. Be it enacted by the General Assembly of the State of Tennessee, That chapter 31 of the Acts of 1877 be so amended and

enlarged as that the provisions of said act shall apply to all corporations chartered or organized under the laws of other States or countries for any purpose whatsoever which may desire to do any kind of business in this State.

SECTION 2. Be it further enacted, That each and every corporation created or organized under or by virtue of any government other than that of this State, for any purpose whatever, desiring to own property or carry on business in this State of any kind or character, shall first file in the office of the secretary of the State a copy of its charter and cause an abstract of same to be recorded in the office of the register in each county in which such corporation desires or proposes to carry on its business or to acquire or own property, as now required by section 2 of chapter 31 of Acts of 1877.

SECTION 3. Be it further enacted, That it shall be unlawful for any foreign corporation to do or attempt to do any business or to own or to acquire any property in this State without having first complied with the provisions of this act, and a violation of this statute shall subject the offender to a fine of not less than $100 nor more than $500, at the discretion of the jury trying the case.

SECTION 4. Be it further enacted, That when a corporation complies with the provisions of this act it shall then be, to all intents and purposes, a domestic corporation, and may sue and be sued in the courts of this State, and subject to the jurisdiction of the courts of this State just as though it were created under the laws of this State.

SECTION 5. Be it further enacted, That when such corporation has no agent in this State upon whom process may be served by any person bringing suit against such corporation, then it may be proceeded against by an attachment to be levied upon any property owned by the corporation, and publication, as in other attachment cases. But for the plaintiff to obtain an attachment he, his agent or attorney, need only make oath of the justness of his claim, that the defendant is a corporation organized under this act, and that it has no agent in the county where the property sought to be attached is situated upon whom process can be served.

SECTION 6. Be it further enacted, That said chapter 31 of the Acts of 1877, except in so far as the same is amended, enlarged and extended by this act, be and the same is declared to be in full force.

SECTION 7. Be it further enacted, That this act take effect from and after its passage, the public welfare requiring it.

Passed March 21, 1891.

THOMAS R. MYERS,
Speaker of the House of Representatives.
W. C. DISMUKES,
Speaker of the Senate.

Approved March 26, 1891.

JOHN P. BUCHANAN, *Governor.*

Upon the same date an act was passed concerning building associations. The part thereof relating to foreign building associations was as follows (chapter 2 of the Acts of 1891).

SEC. 3. Be it further enacted, That no building and loan association organized under the laws of any other State, Territory or foreign government, shall do business in this State unless said
11 association shall (deposit and continually thereafter) keep deposited in trust for all of its members and creditors, with some responsible trust company, or with some State officer of this or some other State of the United States, mortgages (or other securities) received by it in the usual course of its business amounting to not less than twenty-five thousand ($25,000) dollars nor more than fifty thousand ($50,000) dollars, at the discretion of the State treasurer. All of the personal obligations of its members taken in the ordinary course of business of such association and secured on first mortgage on real estate, all dividends and interest which may accrue on securities held in trust, as aforesaid, by the trust company or the State, as provided herein, and all dues or monthly payments which may become payable on stock pledged as security for loans, the mortgages for which are on deposit in accordance with the provisions of this act, may be collected and retained by the association depositing such securities or mortgages so long as such association remains solvent, and faithfully performs all contracts with its members. Any securities on deposit, as provided herein may from time to time, be withdrawn, if others of equal value are substituted therefor. Every building and loan association organized under the laws of any State, Territory or foreign government shall, before commencing to do business in this State,

First. File with the treasurer of this State a duly authenticated copy of its charter or articles of incorporation.

Second. File with the treasurer of this State the certificate of the proper State officer of another State or the president and treasurer of some responsible trust company certifying that it has on deposit securities, not less than $25,000, taken in the regular course of business as mentioned in this act, in trust for all the members and creditors of such building and loan association.

Third. File with the State treasurer a duly authenticated copy of a resolution adopted by the board of directors of such association stipulating and agreeing, that if any legal process affecting such association be served on said State treasurer, and a copy thereof be mailed, postage prepaid, by the party procuring the issuing of the same, or his attorney, to said association, addressed to its home office, then such service and mailing of such process shall have the same effect as personal service on said association of this State.

Fourth. Pay the State treasurer twenty-five ($25) dollars as fees for filing the papers mentioned in this section.

SECTION 7. Be it further enacted: No officer, director or agent of any foreign building and loan association shall, in this State, solicit subscriptions to the stock of such association, or sell, or knowingly cause to be sold or issued, to a resident of this State any stock of an association while said association has not on deposit securities as

required by section 3 of this act, or before said association has
12 complied with all the provisions of this act. License to agents of such companies or associations shall be issued by the treasurer annually, on the first of January and said treasurer is authorized to collect from each agent for said license $2 fee. Any violation hereof shall be deemed a misdemeanor, and upon conviction shall be punished by a fine of not less than ten dollars or more than fifty dollars.

The association filed its charter with the secretary of state of Tennessee on the 11th day of August, 1893, and filed an abstract of the same in the office of the register of Shelby county on August 15, 1893. The association did not comply with the building association laws quoted above in any respect.

There is no evidence that the association solicited stock subscriptions after March 26, 1891, but it does appear that it made several loans of the same kind as the Bedford loan upon stock already subscribed for, after that date.

The supreme court of Tennessee has decided that notes and a mortgage executed under similar circumstances and made payable in Minnesota are Minnesota contracts, but that they are, nevertheless, void in Tennessee and cannot be enforced in the courts of Tennessee. United States Saving & Loan Company *v.* Miller, 47 Southwestern Rep., 17, affirmed on appeal by supreme court, December 18, 1897, without written opinion.

Bedford defaulted in his payments on the notes and the association filed a bill in equity in the circuit court of the United States for the western district of Tennessee to foreclose the mortgage and collect the amount due under his contract. The defendant, Bedford, answered averring that the notes and mortgage were in violation of the above-quoted laws of Tennessee and were void and could not be enforced.

This court, being in doubt upon the questions thus raised, hereby certifies to the supreme court the following questions and respectfully requests answer to the same:

First question. Was the validity of the notes signed in Tennessee by the maker, manually delivered by him to the soliciting agent of the association at Memphis to be transmitted to the association at Syracuse for the acceptance of the association at that place and payable at Syracuse, to be determined by the laws of Tennessee or of New York?

Second question. Was the validity of the mortgage executed and delivered under the same circumstances to be determined by the validity of the note to which it was incident, or by the law
13 of the State where the land lay which the mortgage conveyed, and which upon default must be sold to pay the notes?

Third question. May a State by its laws forbidding the transaction of business within its borders annul the contracts of its citizens entered into and to be performed without the State, when those contracts are but the consummation of the inhibited business within

the State, without an infraction of the 14th amendment to the Constitution of the United States?

Fourth question. Even if a State may by law refuse enforcement of such a contract in its courts, should a circuit court of the United States sitting in the State refuse to enforce it when jurisdiction over the parties exists by reason of their diverse citizenship?

WM. H. TAFT,
HORACE H. LURTON,
A. C. THOMPSON,
Judges of the United States Circuit Court of Appeals for the Sixth Circuit, Sitting in said Case.

October 3, A. D. 1899.

14 United States Circuit Court of Appeals for the Sixth Circuit.

UNITED STATES OF AMERICA, *Sixth Judicial Circuit,* } ss:

I, Frank O. Loveland, clerk of the United States circuit court of appeals for the sixth circuit, do hereby certify that the foregoing certificate and statement of facts in the case of H. M. Bedford and Lou M. Bedford, his wife, *vs.* Eastern Building and Loan Association of Syracuse, N. Y., was duly filed and entered of record in my office by order of said court, and, as directed by said court, the said certificate was by me forwarded to the Supreme Court of the United State for its action thereon.

In testimony whereof I have hereunto subscribed my name and affixed the seal of said court, at the city of Cincinnati, Ohio, this 3rd day of October, A. D. 1899.

Seal United States Circuit Court of Appeals, Sixth Circuit.

FRANK O. LOVELAND,
Clerk of United States Circuit Court of Appeals for the Sixth Circuit.

Endorsed on cover: File No., 17,558. U. S. C. C. of appeals, 6th circuit. Term No., 444. H. M. Bedford and Lou M. Bedford, his wife *vs.* The Eastern Building and Loan Association. Filed Nov'r 10, 1899.

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

No. 153.

H. L. BEDFORD AND LOU M. BEDFORD, HIS WIFE, PETITIONERS,

vs.

THE EASTERN BUILDING AND LOAN ASSOCIATION OF SYRACUSE, NEW YORK.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

CERTIORARI AND RETURN FILED JANUARY 31, 1900.

(17,558.)

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., AUGUST 6, 1900.

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1 *Transcript of Record.*

UNITED STATES OF AMERICA,
Western Division of the Western District of Tennessee.

In the Circuit Court of the United States within and for the Western Division of the Western District of Tennessee, in the Sixth Judicial Circuit thereof.

Proceedings had in said court at a regular term thereof, begun and held for its May, November terms, A. D. 1895–'8, at the United States court-house in the city of Memphis, in said district, in the following cause, to wit:

THE EASTERN BUILDING & LOAN ASSOCIATION OF Syracuse, N. Y., Plaintiff,
vs.
L. L. BEDFORD, LOU M. BEDFORD, Defendant-. } No. 487.

Buchanan & Minor, of Memphis, Tennessee, solicitors for complainant.

Mr. R. M. Heath, of Memphis, Tennessee; Mr. W. C. McLean, of Grenada, Mississippi, solicitors for defendants.

Filed June 30, 1898.

FRANK O. LOVELAND, *Clerk.*

Circuit Court of the United States, Western District of Tennessee.

EASTERN BUILDING & LOAN ASSOCIATION OF SYRACUSE, New York,
vs.
H. L. BEDFORD and LOU M. BEDFORD, His Wife. } No. 487.

Original Bill. Filed June 24, 1895.

To the honorable judges of the circuit court for the western division of the western district of Tennessee:

2 The Eastern Building & Loan Association of Syracuse, N. Y., a corporation organized and existing under the laws of the State of New York, and a citizen of said State, having its principal place of business in the city of Syracuse in said State, brings this, its bill of complaint, against H. L. Bedford and Lou M. Bedford, his wife, both of whom are citizens of and residents in Shelby county, Tennessee. And thereupon your orator complains and says that the said Eastern Building & Loan Association of Syracuse, N. Y., at the times hereinafter mentioned, was lawfully doing business in the State of Tennessee. That in pursuance of written application or subscription for shares made by said H. L. Bedford, your orator did, in accordance with its by-laws, on or about Febr'y 2, 1891, at its office in Syracuse, N. Y., issue to said Bedford a certifi-

cate representing forty-six (46) shares of its capital stock of the par or maturity value of $100.00 per share, which certificate said Bedford accepted and thereby became a member of said association your orator, and has since continued so to be with all the rights, duties, and liabilities of a member as set forth in the by-laws and in the terms and conditions printed on said certificate of stock, the original or a copy of which will be produced at the hearing on or before, if the court or counsel desire. That on or about March 20, 1891, the said H. L. Bedford made an application to your orator at its office in Syracuse, N. Y., for an advance or loan to him of $600.00 upon said forty-six shares of stock held by him as aforesaid; and at a meeting of the board of directors of your orator obtained on said application the preference for said advance or loan as aforesaid on said forty-six shares at a premium of ten per cent. on the gross amount of said loan, to wit: four hundred and sixty dollars ($460.00) and as hereinafter specified, in accordance with the by-laws and rules and regulations of your orator. That upon said application your orator granted to said Bedford, in accordance with its by-laws, an advance or loan of forty-six hundred dollars ($4,600.00) on said forty-six shares of stock as aforesaid, and that said H. L. Bedford, being indebted to your orator in the sum of forty-six hundred dollars ($4,600.00) which he accepted in accordance with the by-laws, rules, and regulations of your orator, which were then and there made a part of said contract, and in consideration of said advance and for the purpose of securing the payment of the principal sum to your orator and also of certain installments of interest and premium as provided by your orator's by-laws, etc., as aforesaid and as hereinafter more fully set forth, said H. L. Bedford duly executed and delivered to your orator seventy-eight (78) certain promissory notes of date May 1, 1891, each for seventy-two dollars and eighty-six cents ($72.86), except three maturing last which are each for the sum of thirty-eight $\frac{36}{100}$ dollars ($38.36), all payable to the order of your orator at its office in Syracuse, N. Y., as follows: One of said notes was to be paid on or before the last Saturday of May, 1891, and one on or before the last Saturday of every month thereafter up to and including the last Saturday of November, 1897, as will appear from said notes which will be produced in court at the hearing and a copy of one of which is attached as Exhibit A, to this bill and prayed to be taken as a part of it but not to be copied. That the notes so executed represent the amount of dues estimated to accrue and become payable on said shares until the same shall mature or reach their par value from the payment of said dues together with the earnings thereon; and the interest and premiums on said advance during said period. That in order further to secure the payment of said principal sum, interest and premium, said H. L. Bedford and Lou M. Bedford, his wife, by their mortgage bearing date May 1, 1891, executed, duly acknowledged, and delivered to your orator, granted and conveyed to your orator, its successors and assigns, the following premises with the appurtenances, to wit:

3

All that parcel or tract of land situate in the 10th civil district of

the county of Shelby and State of Tennessee, bounded and described as follows: Beginning at the southwest corner of J. J. Bailey's "Mull place," thence north with the west line eighty-eight and one-half (88½) rods to center of M. C. R. R.; thence east along the center of said railroad fifty-four and one-quarter (54¼) rods; thence south parallel with the west line eighty (80) rods to said Bailey's south line; thence west along said south line to the place of beginning, containing 30 acres of land. Also all that certain other tract of land situate in said district, county and State, bounded and described as follows: Beginning in the Winchester line at the east line of the John McSwine tract; thence west with the Winchester line three hundred and twenty (320) rods to John C. McLemore's northeast corner; thence south with section line two hundred and sixty (260) rods; thence east one hundred and twenty rods; thence north one hundred and twenty (120) rods; thence east two hundred (200) rods to the middle of Center Hill road; thence north with said road one hundred and forty (140) rods to the place of beginning, containing three hundred and seventy (370) acres of land.

4 The above-described premises being the same premises conveyed to H. L. Bedford by B. W. Lauderdale and wife by deed, dated Feb. 10, 1886, and recorded in vol. 166. p. 406, of the records of said county. Said mortgage was duly acknowledged on June 18, 1891, and filed for registration in the register's office of Shelby county, Tenn., on June 20, 1891, and registered in Book 207, p. 221, as from said mortgage to be produced will hereafter fully appear; a copy of same is hereto annexed, marked Exhibit B. and prayed to be taken as a part of this bill but not to be copied. Your orator is now the legal owner and holder of same. That at the time of the execution and delivery of the notes and mortgage aforesaid, the said H. L. Bedford, in accordance with the by-laws of your orator, as collateral security for said advance or loan, transferred and pledged to your orator said forty-six shares of stock held by him as aforesaid. That by the terms of said mortgage said H. L. Bedford covenanted and agreed to pay said principal, interest and premium at maturity and the interest accruing on said notes after maturity, and all fines and penalties that might be imposed pursuant to the constitution and by-laws of your orator, and to perform all promises and engagements made and entered into with it according to the true intent and meaning of its by-laws and articles of association; also to keep the buildings on said premises insured against loss by fire to such extent and in such manner as should be most satisfactory to your orator or its successors and assigns; to pay all taxes on said premises; and to do and perform many other things relative to said notes and created many rights in favor of your orator and the right to declare all notes due and payable on default in payment of one, all of which will clearly appear from the said mortgage, a copy of which is already an exhibit to and a part of this bill and the original of which will be produced at the trial and is now and at all times at the service of the court and counsel. Your orator prays that this mortgage may be treated as a part of this bill as fully as if it were herein copied and set out in full in

words and figures. Your orator further shows that under the provisions of the articles of incorporation, the by-laws and the terms and conditions of said certificate of shares issued to said H. L. Bedford as aforesaid, he agreed and became bound to pay, upon the *insurance* of the same to him, monthly installments or dues of seventy-five cents ($0.75) on each share, payable on or before the last Saturday of each month until the maturity of said stock. In the by-laws of your orator, which were made a part of said mortgage and printed on said certificate of stock, it is also provided *inter alias*, as follows: "Borrowing members who shall neglect to pay any installments on stock and interest on their loans as the same become due, shall pay to the association a fine of twenty cents per month on each one hundred dollars that they may have borrowed from the association." Also: "If the shareholder or any person shall neglect to pay interest or installments on his loan or the regular monthly installments, fees or dues, for six months, the secretary may compel payment of principal, interest and premiums, assessments, fees or dues by proceeding on his note and mortgage, which shall at once become fully due and payable and the association may cause and treat as forfeited the said shareholder's shares of stock whether deposited as collateral or not, and all payments previously made thereon shall be forfeited to the association. Punctuality and strict performance on the part of all members, borrowers, and shareholders in payment of fines, dues, interest, loans and premiums are the essence of the contract." Also: "Any shareholder who has made a loan by giving taxable property for security shall be bound to pay all State, city, or other taxes or assessments as they may become due in addition to all other payments, and his failure to do so will make his loan, notes, mortgages, premiums and interest at once fully due and payable at the option of the board of directors." Your orator further shows that the notes aforesaid embrace the monthly installments or dues falling due and becoming payable on said stock each month together with the monthly interest and the monthly premium, each at the rate of five per cent. per annum on said advance or loan as provided by the said by-laws, rules and regulations of your orator, proper credit being given for any dues paid on said stock at the time of the execution of said mortgage and notes to secure said advance; that owing to an error in computation, said notes were drawn for the sum of seventy-two dollars and eighty-six cents ($72.86), whereas the same should have been for seventy-two dollars and eighty-three cents ($72.83); said mistake was mutual and due credit has been given for any excess of payment on account of said error, as will hereafter more fully appear.

That defendant, H. L. Bedford, has failed to comply with the terms of said notes and mortgage and certificate, by neglecting to pay the sum of $72.83, the true amount of each of said several notes above described, which amount was due on one note which became due and payable on the last Saturday of June, 1893, which said note still remains due and unpaid, and that the said H. L. Bedford has further neglected to pay a like sum of $72.83, the true amount of

each of the several notes due and payable as aforesaid on the last Saturday of each and every month subsequent to June, 1893;

6 and your orator shows that said H. L. Bedford has failed and neglected and refused to pay said notes and has made default in the payment of all of same that have become due and payable since the month of May, 1893, although payment of same has been duly and often demanded of him. That by reason of the default aforesaid, and under the provisions of its by-laws and the terms of the said mortgage, your orator has elected and does hereby elect and declare the whole of said principal sum, interest, premiums, fines, dues and cost to be now due and payable and to treat said shares of stock as canceled, and the dues paid thereon applicable to the payment of said indebtedness so owing to your orator as shown. That at the time of each and every default as aforesaid, the shares of stock standing in the name of said H. L. Bedford, and by him assigned as aforesaid to your orator as collateral security, had not attained the value of $100.00 each and the same have not attained the value of more than $22.59 each, which is subject to a deduction for fines by reason of the defaults as aforesaid. That in addition to the aforesaid sums there had accrued on April 29, 1895, the further sum additional of $211.60 for fines assessed by your orator for the defaults aforesaid made by said H. L. Bedford and the non-compliance by him with the articles of incorporation, by-laws, rules and regulations of your orator. That on the 29th day of April, 1895, there was justly due your orator by the said H. L. Bedford, after allowing all just credits, deductions and offsets, the sum of $4,279.72, and your orator charges that there is now justly due it and unpaid the sum of $4,279.72, with interest, premiums and fines on said advance from said 29 of April, 1895, until paid, as provided by said mortgage and the by-laws of your orator; and no proceedings have been had at law to recover the aforesaid debt or any part thereof. Your orator now shows that its account with the said H. L. Bedford stands at this date, to wit, April 29, 1895, as follows:

To loan No. 125	$4,600 00	
27 past-due notes at $72.83 each from June, 1893, to April, 1895, incl.	1,675 09	
Fines on arrearages notes, 23 at $9.20 each.	211 60	
		$6,486 69

7 CONTRA.

By payments on certificate No. 4773	$966 00	
Interest on same as per by-laws	73 15	
Payments included in 23 notes above	93 50	
Interest on same as per by-laws	214 35	
Rebate of 27/78 gross premium or *pro rata* amount of premium unearned	159 22	
Overpayment of interest on 25 notes paid at 3c. each	75	
		2,206 97
Balance due		$4,279 72

That the balance owing from said H. L. Bedford, as shown by said amount, has arisen as hereinbefore fully described and that a copy of said account, duly verified, is attached to this bill, marked Exhibit C, and prayed to be taken as a part of it, though not to be copied. Your orator further shows that Lou M. Bedford, one of the defendants herein named, is the wife of the said H. L. Bedford; she is in no way involved in this suit other than as the wife of the mortgagor, H. L. Bedford, of the property herein mentioned, she having joined with her husband in the execution of said mortgage. To this end, therefore, your orator prays that the said H. L. Bedford may answer the several matters and things herein stated, as fully and particularly as if they were herein again repeated and they were thereunto specially interrogated; and that the defendant, H. L. Bedford, may be decreed to pay to your orator the said sum of $4,279.72, due as aforesaid, with interest, premiums and fines to accrue from April 29, 1895, together with any sums paid or which may have to be paid by your orator for taxes or insurance during the pendency of this case; that the premises described in said mortgage, or so much as may be necessary, may be sold to satisfy your orator's claim and recovery; that in such sale all rights of dower and equity of redemption be barred, whether of defendants or of persons claiming under them; that such sale be on a credit of not more than twelve (12) months, one-third of the purchase price to be paid in cash, the remainder in such installments and on such credit as may seem best; that your orator may have execution against the said defendant, H. L. Bedford, for any balance that may then remain due to your orator if the sale of the said property as aforesaid shall fail to produce sufficient to pay the full amount of your orator's claim and recovery, with interest thereon; and that your orator may have such other, further and general relief as the premises may warrant or equity and good conscience demand. Your orator further prays that a writ of subpœna may issue against the said H. L. Bedford and Lou M. Bedford, his wife, both of Shelby county, Tenn., commanding them, and each of them, to appear in this court at some day certain therein named and to answer this bill, though not on oath, the oath in their answer being respectfully waived, and abide by such decree as may be passed therein.

S

BUCHANAN & MINOR,
Solicitors for Complainant.
D. A. PIERCE, *Of Counsel,*
(By H. D. M.)

EXHIBIT A.

No. 9674.

On or before the last Saturday of June, 1891, I promise to pay seventy-two and $\frac{86}{100}$ dollars ($72.86) to the order of the Eastern Building and Loan Association at its office in Syracuse, N. Y., value received.

Bailey, Tenn., May 1st, 1891.

(Signed) H. L. BEDFORD.

EXHIBIT B.

Mortgage—H. L. Bedford and Lou M. Bedford to Eastern Building and Loan Association of Syracuse N. Y., Dated May 1, 1891.

STATE OF TENNESSEE, }
Shelby County. }

Filed for registration June 20, 1891, at 2.00 o'clock p. m. and noted in Note Book No. 13, page 153, and was recorded June 23, 1891, in Record Book No. 207, page 321. Fee, $3.50, paid.
(Signed) E. A. EDMONDSON, *Register*,
By A. G. BOOTH, *D R.*

(Foregoing is on back of mortgage.)

EXHIBIT B—Continued.

This indenture, made this first day of May, in the year of
9 our Lord one thousand eight hundred and ninety-one, between H. L. Bedford and Lou M. Bedford, his wife, of Bailey, Shelby Co., Tenn., parties of the first part, and the Eastern Building and Loan Association of Syracuse, N. Y., a body corporate, party of the second part. Witnesseth: That the said parties of the first part in consideration of the sum of forty-six hundred dollars, to them duly paid, the receipt whereof is hereby acknowledged, have sold, and by these presents do grant and convey to the said party of the second part, its successors and assigns (here follows a description of the lands as stated)—all rights of dower, or homestead in said premises, and the right to redeem the same or any part thereof, in case of foreclosure and sale, and hereby expressly relinquished and waived. And said above-described premises are hereby conveyed with the appurtenances, and all the estate, title and interest therein of the said parties of the first part; and the said H. L. Bedford does hereby covenant and agree to and with the party of the second part, its successors and assigns that at the time of the ensealing and delivery of these presents he is the lawful owner and is well seized in fee-simple of the premises above conveyed, free and clear of all incumbrances, of every name and nature, legal or equitable; and that the premises thus conveyed in the quiet and peaceable possession of the said party of the second part, its successors and assigns, he will forever warrant and defend against any person whomsoever lawfully claiming the same, or any part thereof.

EXHIBIT B—Continued.

This grant is intended as a security for the payment of the sum of fifty-six hundred eighty-three and $\frac{8}{100}$ dollars, the same being the principal, interest and premium of a loan from said association, which said loan was made pursuant to and accepted under the provisions of the by-laws of said association, and which said by-laws have been read by the mortgagor H. L. Bedford, and hereby made

a part of this contract, which said loan is evidenced and secured to be paid by seventy-eight (78) certain promissory notes of even date herewith executed by the said H. L. Bedford, payable to the said association, at its office in Syracuse as follows: One of each of said notes is to be paid on or before the last Saturday of each and every month until all of seventy-eight notes are fully paid, together with interest on each of said notes after maturity at the rate of six (6) per cent. per annum payable semi-annually until said notes are fully paid. And the said mortgagor H. L. Bedford, for himself and his wife, executors, administrators and assigns hereby covenants and agrees with the party of the second part, its successors and assigns to pay said principal, interest and premium at maturity, and the interest accruing on said notes after maturity, and all fines and penalties that may be imposed pursuant to the provisions of the constitution and the by-laws of said association, and also keep and perform all promises and engagements made and entered into with said association according to the true intent and meaning of its by-laws and articles of association; also to keep the buildings erected and to be erected upon said premises insured against loss or damage by fire in an amount and such manner and in such company as shall be the most satisfactory to the party of the second part, its successors or assigns, so that the loss or losses, if any, shall be payable to it or them, and from time to time when taken out issued on said premises, which policies shall contain the best and most approved form of mortgage clause, and at once make due proofs in case of loss, and do all other things required, deliver over to it or them all policies, and renewals thereof by said policies; and also pay and discharge, when due and payable, all taxes, assessments, rates and other charges now or hereafter levied or assessed upon said premises, and remove all adverse claims, clouds and incumbrances; also that, until full payment of the money hereby secured, nothing shall be done or suffered whereby said premises shall be diminished in value or any of said policies of insurance affected or violated. In case default shall be made in effecting such insurance, or payments, rates, other charges, adverse claims, clouds or encumbrances, as aforesaid, it shall be lawful for said second party, its successors or assigns, to effect such insurance and pay such taxes, assessments, rates, other charges, adverse claims, clouds or encumbrances, and the amount so paid shall be a lien on said premises added to the amount secured by these presents and forthwith due and payable without demand with interest, and may be collected in the same manner as the principal sum hereby secured. And it is hereby expressly agreed by and between the parties to these presents, that if default be made in the payment of any one of said notes, or any part thereof as herein provided, or in case of waste, or non-payment of the taxes, assessments, or impositions on said premises, or in case of neglect or refusal to keep the premises insured as herein provided, or in case the improvements thereon shall be kept in good order or repair, or in case of a breach of any of the covenants or agreements contained herein, or in case of failure to duly observe or

keep the by-laws of the said association, and in either
11 or any of such cases, the whole of the said principal sum, interest, premiums, fines, dues and costs, shall at once become due and payable at the option of said association, its successors or assigns, at any time thereafter to sell the premises thereby granted, or any part thereof, in the manner prescribed by law, and of all moneys arising from such sale, to retain the amount due and unpaid for principal, interest, premiums, fines, dues and costs thereof, taxes, assessments, impositions, insurance and other advances, together with the costs and charges of making such sales, and the surplus, if any there be, shall be paid by the party making such sale, on demand, to the said H. L. Bedford, or his heirs or assigns. And this conveyance shall be void if full payment of the aforesaid moneys both principal and interest, be made as hereinbefore specified and if the aforesaid covenants and each of them be well and truly kept and performed as herein specified and provided. In witness whereof the parties of the first part have hereunto set their hands and seals the day and year first above written.

(Signed) H. L. BEDFORD.
LOU M. BEDFORD.

STATE OF TENNESSEE, }
County of Shelby. }

Personally appeared before me, B. J. F. Owen, a notary public in and for the State and county aforesaid, duly commissioned, qualified and acting, H. L. Bedford and Lou M. Bedford, the within-named bargainors, with whom I am personally acquainted, and who acknowledged that they executed the within instrument for the purposes therein contained. And Lou M. Bedford, wife of the said H. L. Bedford, having appeared before me privately and apart from her husband, the said Lou M. Bedford acknowledged the execution of the said instrument to have been done by her freely, voluntarily and understandingly, without compulsion or restraint from her said husband, for the purposes therein expressed.

Witness my hand and seal of office, this 18th day of June, 1891.

(Signed) B. J. F. OWEN,
Notary Public, Shelby County, Tennessee.

12 EXHIBIT C.

Statement.

SYRACUSE, N. Y., *April* 29, 1895.

H. L. Bedford, Bailey, Tenn., in account with Eastern Building and Loan Association of Syracuse, N. Y.

To loan No. 125.....	$4,600 00	
25 past-due notes at $72.83 each, from June, 1893, to April, 1895, inclusive	1,675 09	
Fines on arrearage notes, 23 at $9.20 each...	211 60	
		6,486 69

CONTRA.

By payments on certificate No. 4773.....	966 00	
Interest on same as per by-laws.....	73 15	
Payments included in 23 notes above	793 50	
Interest on same as per by-laws.....	214 35	
Rebate of $\frac{27}{78}$ gross premium or *pro rata* amount of premium unearned	159 22	
Overpayment of interest on 25 notes paid at 3c. each...	75	
		2,206 97
Balance due		$4,297 72

STATE OF NEW YORK, }
County of Onondaga, } ss:

Before me, Albert P. Fowler, a notary public in and for the county of Onondaga in the State aforesaid appointed, qualified and duly commissioned to administer oaths and take depositions, personally appeared Alfred J. Whitton, and he being by me first duly sworn deposed and said that he is the secretary of the Eastern Building & Loan Association, of Syracuse, N. Y., and as such has charge of the records and books of account of said association; that the annexed and foregoing account between said Eastern Building & Loan Association, of Syracuse, N. Y., and H. L. Bedford is in all respects true and correct, and that the said H. L. Bedford is justly indebted to said association in the sum of forty-two hundred, seventy-nine and $\frac{72}{100}$ dollars and that there are no offsets thereto.

ALFRED J. WHITTON.

13 Subscribed and sworn to before me, this 29th day of April, 1895.

ALBERT P. FOWLER,
[SEAL.] *Notary Public in and for Onondaga Co., N. Y.*

Know all men by these presents, that we, the Eastern Building and Loan Association and Buchanan & Minor, — held and firmly bound unto said defendants, H. L. Bedford and Lou M. Bedford, in the sum of two hundred and fifty dollars; but to be void on condition that the said defendants, H. L. Bedford and Lou M. Bedford do pay and satisfy all costs that may accrue in that behalf in the prosecution of the said suit this day commenced by the said plaintiff in the circuit court of the United States for the western district of Tennessee, at said Memphis, against the said defendants; and also on failure of the said plaintiff to prosecute the said suit with effect; and also on failure of the defendants, if convicted to pay said costs.

Witness our hands and seals, this 24th day of June, A. D. 1895.

EASTERN BUILDING & LOAN ASSOC'N, [L. S.]
By BUCHANAN & MINOR, *Solicitors.* [L. S.]
BUCHANAN & MINOR. [L. S.]

Approved by and acknowledged before me, the 24th day of June, A. D. 1895.

J. B. CLOUGH, *Clerk.*

No. 487. U. S. circuit court, western district Tennessee, western division. Eastern Building & Loan Association *vs.* H. L. Bedford, Lou M. Bedford. Cost bond. Buchanan & Minor, attorneys. Returned and filed at Memphis on the 24th day of June, A. D. 1895. J. B. Clough, clerk.

The President of the United States of America to the marshal of the western district of Tennessee, Greeting:

You are hereby commanded to summons H. L. Bedford and Lou M. Bedford, citizens of the State of Tennessee, if to be found within your district, to appear before the circuit court of the United
14 States, in the sixth circuit for the western district of Tennessee, at Memphis, in said district, on the first Monday in August next, and then and there to plead, answer or demur to the bill filed in the office of the clerk of said court on the 24th day of June, A. D. 1895, against said defendants by the Eastern Building & Loan Association of Syracuse, New York, a corporation organized and existing under the laws of the State of New York having its principal place of business in the city of Syracuse in said State and who is a citizen of the State of New York. Here- fail not, and have you then and there this writ.

Witness the Hon. Melville W. Fuller, Chief Justice of the Supreme Court of the United States, and the seal of said circuit court at Memphis, this 24th day of June, A. D. 1895, and the 119 year of American Independence.

[L. S.] JOHN B. CLOUGH, *Clerk.*

Memorandum.

The said defendants, H. L. Bedford and his wife, Lou M. Bedford, are required to enter appearance in this suit in the office of the clerk of the circuit court at Memphis, Tennessee, on or before the day on which the subpœna is returnable, or the allegations of the bill herein will be taken for confessed against said defendants and judgment renderd accordingly.

JOHN B. CLOUGH, *Clerk.*

Marshal's Return.

This writ came to hand on the date of its issuance, and I duly executed the same, as herein commanded, by making the contents thereof known to the within-named defendant, H. L. Bedford, at Memphis, Tennessee, on the 29th day of June, A. D. 1895, and at the same time and place delivering to him a duly certified copy thereof, together with such copy of the bill in this cause; and I further executed this writ by making known the contents thereof to the defendant Lou M. Bedford, at Memphis, Tennessee, on the 29th

day of June, A. D. 1895, and also then and there delivering to her like copy of the same, and of said bill.

Memphis, Tennessee, June 29th, A. D. 1895.

J. A. MONSON,
U. S. Marshal,
By J. A. MONSON, JR, *Deputy.*

15 No. 487. Circuit court of the United States, western district of Tennessee. Eastern Building & Loan Ass'n *vs.* H. L. Bedford, Lou M. Bedford. Summons. Issued 24th day of June, 1895. J. B. Clough, clerk. Returnable to August rule day, A. D. 1895. Ret'd and filed 15th day of October, A. D. 1895. J. B. Clough, clerk. Buchanan & Minor, attorneys.

Circuit Court of the United States, Western District of Tennessee.

EASTERN BUILDING AND LOAN ASSOCIATION OF SYRACUSE, NEW YORK,
vs.
H. L. BEDFORD ET AL. } No. 487.

Answer of the Defendants. Filed Aug. 7, 1895.

Answer of H. L. Bedford and wife, Lou M. Bedford, to the bill filed herein.

The said above-named H. L. Bedford and Lou M. Bedford, saving and reserving all proper exception to said bill and answering only such parts of the same as are material to be answered say:

They admit they are husband and wife as stated. They admit that The Eastern Building & Loan Association of Syracuse, New York, the plaintiff herein, is a corporation of the State of New York, having its principal place of business in New York, and that respondents are citizens and residents of Shelby county, Tennessee. Respondents deny that the Eastern Building & Loan Association of Syracuse, New York, at the time referred to in the bill or at any time, was lawfully doing business in the State of Tennessee and require proof of the bill that it was ever lawfully doing business in said State. Respondents believe it to be true that some written application was made by respondent, H. L. Bedford, in 1891, but do not admit that such application was about Feb'y 2, 1891. Respondents require proof of the date of such application as they cannot give the exact date. As respondents have no copy of such paper and cannot accurately state its terms, they do not admit or deny that it was an application for shares in the plaintiff corporation. Respondents require proof as to this matter and require the production of the paper itself which will disclose what it is and its

16 contents. As respondents, and neither of them, are in possession of any shares of stock in plaintiff corporation and cannot speak definitely as to this matter they deny that on Feb'y 2, 1891, the plaintiff issued to H. L. Bedford a certificate representing 46 shares of its capital stock of the par or maturity value of

$100 per share. They deny that H. L. Bedford accepted such certificate and deny he ever became a member of plaintiff association and that he has continued a member thereof. Respondents require proof of the statement of the bill in this respect and require the production of the certificate of stock which plaintiff claims to have. Respondent- admits that H. L. Bedford made an application to plaintiff at Memphis, Tennessee (where it illegally assumed to carry on business), for a loan of about $4,600, but they deny that the date of such application was about March 20, 1891, and require proof of its date and of the facts in respect to such application. Respondents deny that the said application was to plaintiff at its office in Syracuse, New York. Respondents are ignorant — what took place at any meeting of the board of directors in New York and require proof of the statements of the bill in this respect and as to what was done in respect thereto. Respondents suppose it to be true that plaintiff granted a loan to H. L. Bedford but deny it was $4,600 or that he ever received any such amount. Respondents require proof as to all such matters, and as to the amount actually received by H. L. Bedford and as to the date when the same was given to him. Respondents are ignorant whether this loan was in accordance with the by-laws, rules and regulations of plaintiff and whether this loan was on any shares of stock which had been issued to H. L. Bedford and deny it was and require proof as to these matters. Respondents deny that H. L. Bedford ever received $4,600 of plaintiff or that he ever became indebted to plaintiff in that or any sum or that he accepted any such loan in accordance with the by-laws, rules and regulations of the plaintiff. Respondents admit that H. L. Bedford borrowed a certain sum of money of plaintiff and executed notes to plaintiff which were 78 in number and were dated May 1, 1891, and for the sum stated. Respondents require the production of these notes. Respondents admit that these notes covered more than the amount of money advanced to H. L. Bedford and that they embraced "dues and premiums" claimed by plaintiff but respondents deny that H. L. Bedford ever became a member of plaintiff association or that any "dues or premiums" were ever due legally from him to it. Respondents admit that
17 they executed what purports to be a mortgage, dated May 1, 1891, but they deny that such was a valid instrument in fact or law. What purports to be a partial copy of the same is annexed to the bill. Respondents require the production of the original paper which will speak for itself. Respondents deny that the same was duly executed, acknowledged and delivered to plaintiff and they deny that the same gave plaintiff any rights whatever. Respondents deny that the plaintiff is the legal holder and owner of said instrument or that the same vested any rights whatever in plaintiff. Respondents deny that H. L. Bedford was a member of plaintiff association or that any stock was issued to him or that he pledged any such stock to plaintiff. Respondents require proof of all these statements of the bill. As to the terms of the paper purporting to be a mortgage respondents refer to such paper itself, the bill saying it will be produced at any time. Respondents are igno-

rant what the provisions of plaintiff's articles of incorporation or if its by-laws or of its certificates of shares may be and they require proof as to all such matters as well as to the contents of plaintiff's charter. They deny that H. L. Bedford ever legally or in any way became a member of plaintiff association or that he ever legally or in any way acquired any shares of stock or became bound to pay monthly installments or dues of 75 cents on each share until the maturity of stock or that he became bound to pay fines of 20 cents per month on each share of stock as stated and claimed in the bill. Respondents deny any liability of any kind to plaintiff and require proof of each and every claim made by it. Respondents admit that plaintiff claims H. L. Bedford is a member of plaintiff association, but this is denied as well as any liability whatever by him or under the instrument claimed to be a mortgage. Respondents admit that H. L. Bedford has failed and refused to pay all of the notes falling due the last Saturday in June, 1893, and since, but respondents deny that plaintiff has any right whatever to collect said notes or fines or to enforce any other claim set up by it and they deny anything on any account is due to plaintiff. Respondents deny that there is due to plaintiff $4,279.72 or any amount. Further answering respondents say that on March 19, 1877, the legislature of the State of Tennessee passes an act which was approved March 21, 1877, specifying the terms upon which foreign corporations could do business in the State of Tennessee. This act (page 44 of Acts of 1877) applied only to certain classes of foreign corporations. On March 10, 1891, the legislature of the State of Tennessee passed an act (page 212 of Acts of 1891) which was approved March 17, 1891. This act
18 extended the act of 1877, just mentioned, to "building and loan associations," and other kinds of foreign corporations not previously embraced therein, and imposed the same terms and conditions upon them before they could transact business in Tennessee. If plaintiff be a "building and loan association" in fact and not simply in name then the requirements specified in the act of 1877 were extended to plaintiff by the act just mentioned.

These requirements were that the foreign corporations referred to in said acts should, before transacting any business or asserting or acquiring any right, should first file in the office of the secretary of state of Tennessee a copy of its charter or articles of association and should cause an abstract of the same to be recorded in the office of the register of each county of the State of Tennessee, in which it was proposed to carry on business or to acquire lands. On March 21, 1891, the legislature of the State of Tennessee passed an act which was approved March 26, 1871 (Acts of 1891, page 264), which extended the act of 1877 above alluded — "to all corporations chartered or organized under the laws of other States or counties for any purpose whatsoever, which may desire to do any kind of business in this State." This act specified the terms upon which foreign corporations should be allowed to carry on business or acquire property in Tennessee. This act of March 21, 1891 required such foreign corporations "desiring to own property or carry on business in this State of any kind or character" to "first file in the office of the sec-

retary of state a copy of its charter and cause an abstract of same to be recorded in the office of the register in each county in which such corporation desires or proposes to carry on its business or to acquire or own property as now required by section 2 of chapter 31 of Acts of 1877. The said act provided "that it shall be unlawful for any foreign corporation to do or attempt to do any business or to own or acquire any property in this State without having first complied with the provisions of this act."

Respondents refer to said act for a full statement of their terms. Respondents state further that the legislature of the State of Tennessee, on March 26, 1891, passed another act (page 17 of Acts of 1891), which was approved March 28, 1891. The last-named act applies to "building and loan associations" "organized under laws of foreign States and desiring to do business in Tennessee, and requires such associations, before doing any such business, to make
19 deposits of certain securities and further to file with the treasurer of the State of Tennessee a copy of its charter and certificate of deposit of the securities above mentioned. Respondents refer to these various acts of the State of Tennessee for a full statement of their terms and requirements. Respondents state that at the time of the various transactions between H. L. Bedford and the plaintiff, and at the time of the making of the notes mentioned in the bill and at the time of the execution and delivery of the instrument claimed to be a mortgage from respondents, and at the time that H. L. Bedford is claimed to have become a member of the plaintiff association and to have acquired the stock therein and pledged the same and to have had the various transactions he is claimed to have had with the plaintiff, that the plaintiff was a foreign corporation unauthorized to transact business in Tennessee, as it had not complied with any of the laws of Tennessee hereinbefore referred to. No copy of its charter or abstract of the same had been filed in the office of the secretary of state or of the State treasurer in Tennessee, and no abstract or copy had been registered in Shelby county, Tennessee, where plaintiff was assuming then to carry on business, and no deposit of securities had been made by plaintiff or certificate of deposit filed with the State treasurer. None of the requirements of the acts of the legislature had been complied with and all of the transactions had by the plaintiff with respondents or respondent H. L. Bedford were unauthorized and void. No contracts could be made by or with it and all of the same were void and could and cannot be enforced. At that time the said plaintiff was assuming to carry on business in Shelby county, Tennessee, where the various transactions in question took place. Respondents state further that the object of all of the transactions in question was to loan money to H. L. Bedford, and that whatever was done was incidental to this object, and in order to accomplish the same. Respondents were residents of Shelby county, Tennessee, and whatever was done by H. L. Bedford was done and was to be done in Shelby county, Tennessee, where all of the intercourse and business between plaintiff and respondents was to be and was carried on. Respondents claim and insist that the said H. L. Bed-

ford could never become and never became a member of the plaintiff association; that he could not acquire and never acquired stock therein or pledged the same, and that the paper claimed to be a mortgage could not be and was ineffectual as a mortgage. Respondents claim and insist that all of the transactions in
20 question had with plaintiff, and any and all papers executed in violation thereto, arose out of and was business attempted to be carried on by plaintiff in Tennessee when it had not complied with the laws of Tennessee, and that all of such acts, transactions and papers were void and could give rise to no cause of action against respondents, and respondents insist on and plead the invalidity of all such acts and transactions and the invalidity of any and all notes or instruments which may have been executed as a full and complete defense herein. Respondents believe some abstract of charter was filed with the secretary of state at Nashville about Aug. 11, 1893, and filed for record in the register's office of Shelby county about Aug. 15, 1893, but respondents deny the abstract so filed or registered was such as to comply with the laws aforesaid and require proof of what was actually done so the court can determine this question and the effect thereof, but respondents deny that the previous illegal contracts were in any way affected or legalized thereby. Respondents deny that the laws of Tennessee were ever complied with by the plaintiff, or that plaintiff was ever authorized to do business in Tennessee, and require proof from plaintiff on this subject. Further answering, respondents deny, upon information and belief, that the plaintiff is or was a "building and loan" institution. It is simply so in name, but not in fact, and is and was merely engaged in loaning money or in similar business, and is and was in no sense a building and loan company. But whether one or not, respondents deny that it complied with the laws of the State of Tennessee in reference to foreign corporations, and aver that the so called contracts were void as aforesaid. Further answering, respondents state that on May 9, 1895, the legislature of the State of Tennessee passed an act, which was approved May 10, 1895. A copy of this act is annexed hereto as Exhibit A, and the same is referred to and made a part hereof. This act undertook to validate contracts which had been made by foreign corporations in Tennessee after the passage of the act of M'ch 21, 1891, and M'ch 10, 1891, without complying with the requirements of those acts.

This act, however, did not refer to or attempt to modify or abrogate the act of Dec. 26, 1891, hereinbefore mentioned. Respondents claim and insist that this act of May 9, 1895, is void and that the previous acts attempted to be modified thereby are still in full force and that all contracts entered into in violation thereof are still void, the act of May 9, 1895, to the contrary notwithstanding. If respondents are mistaken in this however then they state and insist that the plaintiff never complied with the
21 requirements of the act of M'ch 26, 1891, and that if plaintiff be a building & loan institution and fall within that act it never had the right to transact business in Tennessee. And that all

of the transactions had with it are void and no liability of any kind exists against respondents. Further answering, respondents say that when the various transactions were had with the plaintiff that all of the same and all of the so called contracts were illegal and void and created no liability against respondents or either of them and the legislature of the State of Tennessee could not legally thereafter pass any act which would validate contracts which never existed and thus impose obligations on parties which they had never been under. The legislature was powerless to make contracts for parties. Respondents therefore insist that the said act of May 9, 1895, was and is void and that before its passage no liability existed against these respondents or either and no right to subject the property proceeded against and that such is still the case, the said — to the contrary notwithstanding. Respondents insist that the act of May 9, 1895, attempts to make contracts between plaintiff and respondents as plaintiff and respondent, H. L. Bedford, when by its own terms it shows no contract ever existed and it thus seeks to take away the money and property of respondent H. L. Bedford or respondents without due process of law contrary to and in violation of the constitution of the State of Tennessee and of the United States. The said act of May 9, 1895, is also void as it is in conflict with section 17 of article 24 of the constitution of the State of Tennessee which provides "No bill shall become a law which embraces more than one subject that subject to be expressed in the title; all acts which repeal, revive or amend former laws shall recite in their caption or otherwise the title or substance of the law repealed, revived or amended." The said act of May 9, 1895, is in violation otherwise of the said constitution of the State of Tennessee and of the United States and is void for this and other reasons. Further answering respondents state that the plaintiff however is not claiming the benefit of said act of May 9, 1895, but is proceeding herein on the theory that the contracts set up by it were and always had been valid which is here expressly denied. The said act of May 9, 1895, however in undertaking to validate contracts, referred to therein, or rather in undertaking to substitute other contracts in their place provides expressly that no mortgage or deed of trust executed to a foreign corporation shall be foreclosed whether under a power of sale or by judicial decree until 2 years after the passage of that act and the said act further provides that in settle-
22 ment under that act "not more than 6 per cent. on the amount actually received by the parties shall be collected but notes signed in this State and payable in this State but wholly secured by deeds of trust or mortgages on land in other States shall be enforced for the amount of interest permitted in the State where the land is located." Respondents state that the notes in question were signed in Shelby county, Tennessee, and were payable on their face in New York but that they were in fact contemplated to be paid to plaintiff's agents in Memphis, Tennessee, and those notes that were paid were paid to such agents in Memphis. Respondents insist and claim that the contracts, undertakings, notes and instruments relied on by plaintiff were and are yet illegal and void and that no liability what-

ever existed or now exists on account thereof. Respondents claim that plaintiff never complied with any of the requirements of any of the acts of the State of Tennessee hereinbefore mentioned and that the requirements of each and every act either had to be met before valid contracts could be made, or that such requirements of such act or acts as were applicable and necessary were not in fact complied with. Respondents insist as hereinbefore that the act of May 9, 1895, was void but even if valid it did not abrogate the act of M'ch 26, 1891, or undertake to validate contracts made where its requirements had not been complied with and that whether the act of May 9, 1895, is valid or not that plaintiff herein has no rights of any kind against these respondents or either if the plaintiff be a building & loan association in fact and the act of M'ch 26, 1891, applies. These various acts are submitted to the court in connection with the facts of this case and the court is asked to determine their application and effect. Further answering respondents say that if they should be mistaken in supposing that the act of May 9, 1895, is without validity, and in supposing that such act did not modify or abrogate the act of M'ch 26, 1891, if it applies and did not validate contracts made in contravention of this act that then the act of May 9, 1895, especially provides that no foreclosure by decree or otherwise can be had until 2 years after the passage of the act of May 9, 1895, and that "not more than 6 per cent. on the amount actually received by the party shall be collected."

Respondents set up and plead this act if it be valid and applicable as a complete defense herein and insist that this suit shall be dismissed as the two years have not expired and no right to a foreclosure or for other purposes now exists. If mistaken in this claim that the suit should be dismissed then
23 respondents insist that no decree shall be rendered during the 2 years or if rendered that it shall provide for no foreclosure earlier than the expiration of the 2 years referred to in said act. Respondents insist further that under this act no liability exists for the whole amount of the notes sued on but simply for the amount actually allowed by the act of May 9, 1895. If the court should be of the opinion that this act is valid and applies to this case then respondents insist that any decree which may be rendered shall conform to this act both in amount and as to the time of foreclosure and method thereof, and the said act, if valid, and applicable is plead as a complete defense herein. Respondents state further that the act of May 9, 1895, provides "but no alien corporation owning land in this State shall have the benefit of this stay of foreclosure proceedings." Respondents state that the plaintiff is and was an alien corporation and suggest to the court that it probably did own at the time of the transactions in question and does own land in Tennessee, and respondents insist that such being the case that the said act of May 9, 1895, excludes plaintiff from its benefits and this fact is set up and plead herein as a defense. Further answering respondents state and claim that while the notes executed by H. L. Bedford are dated May 1, 1891, that the money loaned to H. L. Bedford was not advanced to him until about June

18th or 20th, 1891, at which time the transaction was closed and the instrument claimed to be a mortgage was acknowledged and filed for record. That about June 18th or 20th, 1891, the plaintiff paid to H. L. Bedford the sum of $4,140, which was all he received and that the notes executed and secured by the instrument claimed to be a mortgage were given in consideration thereof. Respondent, H. L. Bedford, paid all of the notes except those in suit as they fell due and respondents claim and insist in any event all of such payments shall go as a full credit on the amount received, but respondents deny any liability whatever on any account as hereinbefore. Respondents deny any and all liability for any amount or anything but aver that if any liability exists at the utmost there could be no liability for any amount beyond the actual amounts received by H. L. Bedford and legal interest thereon and respondents aver and claim and insist that any excess in the notes over and above this sum was and is usury and this fact is set up and plead and if any liability is decreed to exist this usury is asked to be eliminated and full credit given for all payments of notes which were made, and as bearing on this question respondents state that all of the
24 transactions in question were Tennessee transactions and governed by Tennessee law, but that the legal rate of interest in Tennessee and in New York is the same, and all in the notes above the sum actually received and the legal rate of interest is usury, no matter which law applies. And now having fully answered respondents ask to be hence dismissed with costs.

FRAZER & HEATH, *Sol's.*

EXHIBIT A.

Senate Bill No. 170.

A bill to be entitled An act to postpone the foreclosure of certain mortgages or trust deeds and to validate contracts heretofore made by foreign corporations in this State, where such corporations failed to comply with the requirements of chapters 95 and 122 of the Acts of 1891 and chapter 31 of the Acts of 1877, providing that any such corporation desiring to own property or to carry on business in this State shall file a copy of its charter in the office of the secretary of state, and cause an abstract of the same to be recorded in the office of the register of each county in which such company desires to carry on business or own property.

SECTION 1. Be it enacted by the General Assembly of the State of Tennessee, That the contracts of any foreign corporation created or organized by any State or government other than that of this State, that has heretofore engaged in business, made contracts or purchased property in this State after the passage of said chapters 95 and 122 of the Acts of 1891, without first complying with the provisions of the same, shall be as valid and binding in all respects as if a copy of its charter had been filed with the secretary of state, and an abstract of same filed in each county where such corporation carried on business or made contracts, provided that this sec-

tion shall apply only to such foreign corporations as have already in good faith complied with the provisions of said chapters 95 and 122 of the Acts of 1891, and chapter 31 of the Acts of 1877, by filing a copy of its charter with the secretary of state and recording abstracts thereof in each county in which such corporation carried on business or made contracts, or shall within four months after the passage of this act so file such charter and abstracts of same; provided, however, that no mortgage or deed of trust, executed to a foreign corporation, or to a trustee, to secure indebtedness to a foreign corporation upon real estate in this State, when such foreign corporation had not complied with the laws of this State at the time such mortgage or deed of trust was executed, shall be foreclosed either under a power of sale or judicial decree, until two years after the passage of this act, but no alien corporation owning land in the State shall have the benefit of this stay of foreclosure proceedings.

SEC. 2. Be it further enacted That in settlements made under this act not more than 6 per cent. on the amount actually received by the parties shall be collected, but notes signed in this State and payable in this State, but wholly secured by deed of trust or mortgages on land in other States, shall be enforceable for the amount of interest permitted in the State where the land is located.

SEC. 3. Be it further enacted, That this act take effect from and after its passage, the public welfare requiring it.

Passed May 9, 1895.

ERNEST PILLOW,
Speaker of the Senate.
JNO. A. TIPTON,
Speaker of the House of Representatives.

Approved May 10, 1895.
A true copy.

W. S. MORGAN,
Secretary of State.

UNITED STATES OF AMERICA,
Western District of Tennessee, } ss:

Personally appeared before me, W. B. Weisiger, D. clerk of the United States circuit court, H. L. Bedford, who made oath in due form of law that the statements made in the foregoing answer as of his own knowledge are true, and those made upon information he believes to be true.

H. L. BEDFORD.

Sworn to and subscribed before me, this 25 day of July, 1895.

W. B. WEISIGER, *D. Clerk.*

26 Circuit Court of the United States, Western District of Tennessee.

EASTERN BUILDING & LOAN ASSOCIATION
vs.
H. L. BEDFORD ET AL. } No. 487.

Complainant's Replication. Filed Sept. 10, 1895.

This repliant, saving and reserving to itself all and all manner of advantage of exception, which may be had and taken to the manifold errors, uncertainties and insufficiencies of the answer of the said defendants, for replication thereunto saith that it doth and will aver, maintain, and prove its said bill to be true, certain and sufficient in the law to be answered by the said defendants, and that the answer of the said defendants is very uncertain, evasive, and insufficient in law to be replied unto by this repliant; without that, that any other matter or thing in the said answer contained, material or effectual in the law to be replied unto, and not herein and hereby well and sufficiently replied unto, confessed or avoided, traversed or denied, is true; all which matters and things this repliant is ready to aver, maintain, and prove and humbly prays as in and by its said bill it hath already prayed.

BUCHANAN & MINOR,
For Complainant.

UNITED STATES OF AMERICA,
Western Division of the Western District of Tennessee.

In the Circuit Court of the United States within and for the Western Division of the Western District of Tennessee, in the Sixth Judicial Circuit Thereof.

Proceedings had in said court at a regular term thereof, begun and held for its May term, A. D. 1895, at the United States court-house in the city of Memphis, in said district, on to wit: the 22d day of November, A. D. 1895, in the following cause, to wit:

EASTERN BUILDING & LOAN ASSOC'N, Plaintiff,
vs.
H. L. BEDFORD & WIFE, Defendant-. } No. 487.

27 For satisfactory reasons to the court appearing it is hereby ordered by the court that the above-entitled cause be and it is hereby continued to the next term of the court.

No. 487. Circuit court of the United States, western district of Tennessee. Eastern Building & Loan Assoc'n *vs.* H. L. Bedford and wife. Order of court. Entered and filed 22 day of Nov., A. D. 1895. John B. Clough, clerk.

Circuit Court of the United States, Western District of Tennessee.

EASTERN BUILDING & LOAN ASS'N
vs.
H. L. BEDFORD and WIFE. } No. 487.

Mortgage. Filed Dec. 6, 1895.

This indenture made this first day of May, in the year of our Lord one thousand eight hundred and ninety-one between H. L. Bedford and Lou M. Bedford his wife, of Bailey, Shelby Co., Tenn., parties of the first part and the Eastern Building and Loan Association, of Syracuse, N. Y., a body corporate party of the second part witnesseth, that the said parties of the first part in consideration of the sum of forty-six hundred dollars to them duly paid, the receipt whereof is hereby acknowledged, have sold and by these presents do grant and convey to the said party of the second part, its successors and assigns all that tract or parcel of land situate in the 10th civil district of the county of Shelby and State of Tennessee, bounded and described as follows: Beginning at the southwest corner of J. J. Bailey's "Mill place," thence north with the west line eighty-eight and one-half rods (88½) to center of M. & C. railroad; thence east along the center of said railroad fifty-four and one-quarter (54¼) rods; thence south parallel with the west line eighty (80) rods to said Bailey's south line; thence west along said south line to the place of beginning, counting thirty acres of land. Also that certain other tract or parcel of land situate in said district, county and State bounded and described as follows, viz: Beginning in the Winchester line at the east line of the John Mc. McSwin tract; thence west with the Winchester line three hundred and twenty (320) rods to John C. McLenner's northeast corner;
28 thence south with section line two hundred and sixty (260) rods; thence east one hundred and twenty (120) rods; thence north one hundred and twenty (120) rods; thence east two hundred (200) rods to the middle of Center Hill road; thence north with said road one hundred and forty (140) rods, to the place of beginning containing three hundred and seventy (370) acres of land, the above-described premises being the same premises conveyed to said H. L. Bedford by B. W. Louderdale and wife by deed, dated Feb'y 10, 1896, and recorded in vol. 166, page 406, of the records of said county. All rights of dower or homestead in said premises and the right to redeem the same or any part thereof in case of foreclosure and sale are hereby expressly relinquished and waived and said above-described premises are hereby conveyed with the appurtenances and all the estate, title and interest therein of the said parties of the first part. And the said H. L. Bedford does hereby covenant and agree to and with the party of the second part, its successors and assigns that at the time of the ensealing and delivering of these presents he is the lawful owner and is well seized in fee-simple of the premises above conveyed free and clear of all encumbrances of every name and nature, legal or equitable, and that the premises

thus conveyed in the quiet and peaceable possession of the said party of the second part its successors and assigns he will forever warrant and *define* against any person whomsoever lawfully claiming the same or any part thereof. This grant is intended as security for the payment of the sum of fifty-six hundred eighty-three and $\frac{8}{100}$ dollars, the same being the principal, interest and premium of a loan from said association which said loan was made pursuant to and accepted under the provistons of the by-laws of said association and which said by-laws have been read by the mortgagor H. L. Bedford and are made a part of this contract, which said loan is evidenced and secured to be paid by seventy-eight (78) certain promissory notes of even date herewith executed by the said H. L. Bedford payable to the said association at its office in Syracuse as follows: One of each of said notes to be paid on or before the last Saturday of each and every month until all of said seventy-eight notes are fully paid together with the interest and each of said notes after maturity at the rate of six (6) per cent. per annum payable semi-annually until said notes are fully paid. And the said mortgagor, H. L. Bedford for himself and his heirs, executors, administrators and assigns hereby covenants and agrees with the party of the second part, its successors and assigns to pay said princip*le*, interest and premiums at maturity and the interest accruing on said notes after maturity and all fines and penalties that may be imposed pursuant to the provisions of the constitution and by-laws of said association and also to keep and perform all promises and engagements made and entered into with said association according to the true intent and meaning of its by-laws and articles of association, and also to keep the buildings erected, and to be erected upon said premises insured against loss or damage by fire in an amount *are* in such manner and in such company as shall be m*u*st satisfactory to the party of the second part its successors or assigns so that the loss or losses if any shall be payable to it or them and from time to time when taken out issued on said premises which policies shall contain the best and most approved form of mortgage clause. And at once to make due proofs in case of loss and do all other things required, deliver over to it or them all policies and renewals thereof by said policies, and also pay and discharge when due and payable all taxes, assessments, rates and other charges now or hereafter levied or assessed upon said premiums and remove all adverse claims, clouds and encumbrances, also that until full payment of the money hereby secured nothing shall be done or suffered whereby said premises shall be diminished in value or any of said policies of insurance affected or vitiated.

In case default shall be made in effecting such insurance or in paying, discharging or removing such taxes, assessments rates, other charges, adverse claims, claims or encumbrances as aforesaid, it shall be lawful for said second party, its successors or assigns, to effect such insurance and pay such taxes, assessments, rates, other charges, adverse claims, choses or encumbrances and the amount so paid shall be a lien on said premises added to the amount secured by these presents and forthwith due and payable without demand,

with interest, and may be collected in the same manner as the principal sum hereby secured. And it is hereby expressly agreed by and between the parties to these presents that if default be made in the payment of any one of said notes or any part thereof as herein provided or in case of waste or non-payment of the taxes, assessments or impositions on said premises, or in case of neglect or refusal to keep the premises, insured as herein provided or in case the improvements thereon shall not be kept in good condition or repair, or in case of a breach of any of the covenants or agreements contained herein, or in case of failure to duly observe and keep the by-laws of the said association and in either or any of such cases, the whole of the said principal sum, interest, premiums, fines, dues and costs, shall at once become due and payable at the option of said association, its successors or assigns, and it shall be lawful for said association or its successors or assigns at any time thereafter to sell the said premises hereby granted, or any part thereof, in the manner prescribed by law and out of the moneys arising from such sale to retain the amount due and unpaid for principal, interest, premiums, fines, dues and costs thereof, taxes, assessments, impositions, insurance and other advances, together with the costs and charges of making such sale, and the overplus, if any there be, shall be paid by the party making such sale on demand to the said H. L. Bedford, or his heirs or assigns. And this conveyance shall be void if full payment of the aforesaid moneys, with principal and interest, be made as hereinbefore specified, and if the aforesaid covenants and each of them be well and truly kept and performed as herein specified and provided.

In witness whereof the parties of the first part have hereunto set their hands and seals the day and year first above written.

H. L. BEDFORD. [L. S.]
LOU M. BEDFORD. [L. S.]

STATE OF TENNESSEE, }
County of Shelby. }

Personally appeared before me B. J. F. Owen, a notary public in and for the State and county aforesaid, duly commissioned and qualified and acting, H. L. Bedford and Lou M. Bedford, the within-named bargainors, with whom I am personally acquainted and who acknowledged that they executed the within instrument for the purposes therein contained. And Lou M. Bedford, wife of the said H. L. Bedford, having appeared before me privately and apart from her said husband, the said Lou M. Bedford acknowledged the execution of the said instrument to have been done by her freely, voluntarily and understandingly, without compulsion or constraint from her said husband for the purposes therein expressed.

Witness my hand and seal of office this 18 day of June, 1891.

[L. S.]

B. J. F. OWEN,
Notary Public, Shelby County, Tennessee.

STATE OF TENNESSEE, }
Shelby County. }

Filed for registration June 20, 1891, at 2 o'clock p. m., and noted in Note Book No. 13, page 153, and was recorded June 23,
31 1891, in Record Book No. 207, page 321. Fee $3 50, paid.
E. A. EDMONDSON, *Register.*
A. Y. BOOTH, *D. R.*

Circuit Court of the United States, Western District of Tennessee.

EASTERN BUILDING & LOAN ASSOCIATION }
vs.
H. L. BEDFORD and WIFE. }

Deposition of D. A. Pierce. Filed Feb'y 20, 1896.

The deposition of D. A. Pierce, a witness for complainant in the above cause, taken on interrogatories, to be read at the trial of said cause. Notice and all formalities waived and the right to except to said deposition for matters of irrelevancy or incompetency is alone reserved by agreement of counsel. Buchanan & Minor, for association; Frazer & Heath, att'ys for defendants.

Int. 1. State your name, residence and business. If you have any connection with the complainant in this cause, please state what is its character and for how long it has existed.

STATE OF NEW YORK, }
Northern District, County of Onondaga, } *ss:*

D. A. Pierce, the witness called on behalf of the plaintiff herein, and residing at the city of Syracuse, N. Y., more than one hundred miles from the place where this cause is to be tried, being duly *continued* and sworn to tell the whole truth, and being carefully examined, deposes and says as follows:

1. To the first interrogatory he says: My name is D. A. Pierce; I reside in the city of Syracuse, N. Y., and am an attorney and counselor at law; I am the general attorney for the complainant and have been since April, 1890; I am also one of the directors of complainant and have been since May, 1894.

32 Int. 2. Are you familiar with the transactions between the complainant and the defendant, H. L. Bedford; if so, how came you to be so?

2. To the second interrogatory he says: I am familiar with the transactions between the complainant and the defendant, H. L. Bedford, by reason of the fact that as attorney for the complainant, I had charge of drawing the papers, attending to closing the loan with him, as well as attending all meetings of the directors of the complainant.

Int. 3. The answer of the defendant admits that the complainant, The Eastern Building & Loan Association, is a corporation duly incorporated under the laws of the State of New York. Will you

file as an exhibit to your deposition a certified copy of said company's charter and mark it "Exhibit A"?

3. To the third interrogatory he says: The paper that I hold in my hand is a certified copy of the charter or articles of incorporation of the complainant. Received in evidence and hereto annexed, marked "Exhibit A, A. P. Fowler, notary public."

Int. 4. I hand you here what purports to be an application by H. L. Bedford for shares in your association, dated January 23, 1891; please state whether it is really what it purports to be and whether it was received by the association from Bedford, and at what date. Do you know the signature of said Bedford and is that his signature which is attached to said application? Attach said application to this deposition as an exhibit; if you can't attach the original, say why, and attach a certified copy thereof.

4. To the fourth interrogatory he says: The instrument handed me purporting to be an application by H. L. Bedford for shares and membership in the Eastern Building & Loan Association of Syracuse, N. Y., and dated January 23, 1891, is the original instrument under which forty-six (46) shares of stock of the association were issued to said Bedford. It was received by the association by mail through H. B. Martin about the 26th day of February, 1891. I have never personally seen said Bedford write, and know his signature only from papers purporting to be executed by him and duly sworn to or acknowledged before a competent officer. The instrument which I hold in my hand is the original application for said shares and membership. Received in evidence and hereto attached marked "Exhibit B." A. P. Fowler, notary public.

Int. 5. Were any shares of complainant's stock issued to said Bedford? If so, was such issuance in pursuance of that application?

33 5. To the fifth interrogatory he says: Forty-six (46) — of complainant's stock were issued to said Bedford in pursuance of said application. "Exhibit B," A. P. Fowler, notary public.

Int. 5½. If you say such shares were issued to Bedford, state when they were issued and why? What became of such shares? Does Bedford still retain them? What disposal, if any, has he made of them?

5½. To the five and one-half interrogatory he says: Said shares were issued to said Bedford on the 26th day of January, 1891, by reason of said application and were dated February 2d, 1891, for the reason that all shares of stock issued by the association were issued in monthly series, and all stock issued after the 15th of any month were dated on the first business day of the succeeding month. After said certificate of shares were issued the same was mailed to said Bedford through J. H. T. Martin. He still retains them with the exception that they have been pledged by him to the complainant as security for the loan or advance thereon made him by the complainant.

Int. 6. I here hand you a certificate of stock, purporting to be a certificate of shares of stock in complainant association, issued to H. L. Bedford. Please state what it is; whether it is what it pur-

ports to be and whether it was issued at the time stated on its face. Was it ever accepted by the Bedford to whom it was issued? What is that printed on the back of the lower half of said certificate?

6. To the sixth interrogatory he says: The certificate of stock handed me purporting to be the certificate of shares of stock in the complainant association issued to H. L. Bedford is the original instrument issued by complainant association to H. L. Bedford, and is the instrument issued by said association showing that said Bedford is a shareholder therein and the owner and holder of forty-six (46) shares of installment stock and is what it purports to be. It was issued on the 26th day of January, 1891, under date of February 2d, 1891, for the reason stated in the answer to interrogatory 5½. It was accepted by said Bedford and the printing on the back of the lower half of said certificate are the by-laws of said association.

Int. 7. When the party to whom such a certificate is issued accepts the same, what effect as to his relations with the association does such acceptance work?

7. To the seventh interrogatory he says: When the party to whom such certificate is issued accepts the same he becomes a member and shareholder of the association and is charged with the pay-
34 ment of the duties called for in his certificate of shares in accordance therewith and as provided by the articles of incorporation and by-laws; has the right to vote on said shares at all meetings of the shareholders and has all the rights, and is charged with all of the duties of a shareholder in accordance with law, the articles of incorporation or charter, by-laws, rules and regulations of the association.

Int. 8. I here hand you what purports to be an application for a loan marked on back "Approved May 18, 1891." Is it what it purports to be? Is that Bedford's signature attached? If the same was an application for a loan, when was it in fact made and at what place?

8. To the eighth interrogatory he says: The instrument handed me purporting to be an application for a loan marked on back "Approved May 18, 1891," is what it purports to be, an application for a loan. The signature attached purports to be that of H. L. Bedford with which I am familiar only as above stated. The application for loan was made on or prior to May 5, 1891. It purports to have been made, filled out and signed on or prior to May 5, 1891, at Memphis, Tenn., and was received at the office of the complainant in the city of Syracuse, N. Y., and was acted upon and granted by the directors of complainant association at a regular meeting held at its offices in said city of Syracuse.

Int. 9. I also hand you what purports to be an "application for an advance to which is attached the affidavit of one H. L. Bedford. What is it in fact, and is that Bedford's signature which is attached?

9. To the ninth interrogatory he says: The instrument handed me purporting to be "an application for an advance," to which is attached the affidavit of one, H. L. Bedford, is the acceptance by the applicant of the action of the board of directors of the complainant

on the application made by said Bedford referred to in interrogatory 8, and an additional agreement by him to comply with the charter, by-laws and requirements of the board of directors of the complainant. The signature attached purports to be that of H. L. Bedford, with which I am familiar only as stated in answer to interrogatory four.

A. P. FOWLER,
Notary Public.

Int. 10. If you say that the two papers just mentioned are applications to the complainant association for a loan, state whether or not a loan was made to H. L. Bedford, in pursuance thereof. If such a loan was made, under what terms and conditions was it made?

35 10. To the tenth interrogatory he says, that a loan or ad--ance as the same is sometimes termed, was actually made to said Bedford in pursuance of the papers referred to in interrogatories 8 & 9, as well as by virtue of the board of directors of complainant on the paper referred to in interrogatory 9, and the papers referred to in interrogatories 4 & 6. Such loan was made on the agreement that the applicant would pay for the privilege of said advance a gross premium of ten per cent. at the time of the consummation of the loan, a monthly premium at the rate of five per cent. per annum and monthly interest at the rate of five per cent. per annum thereon, and also the dues on said shares so advanced or loaned upon, to wit, forty-six (46) until the maturity of said shares estimated at seventy-eight months, and for the purpose of securing said payment pledge said shares of stock as collateral to said loan, and execute notes for said monthly payments of both dues on said shares and interest and premium on said loan or advance, and further secure the payment of the same by a mortgage on unincumbered, approved real-estate security, all in conformity with the provision of the charter or articles of incorporation, by-laws, rules and regulations of the association.

Int. 11. The answer admits the execution of mortgage by defendant Bedford and wife, to complainant, but denies that it was delivered to complainant. Do you know the facts as to this, if so, what are they? And do you know of anything that affects the validity of such mortgage? And state here whether the mortgage already in evidence is the mortgage executed by defendants to the association and was delivered by defendants to the association, and who is the holder and legal owner of said mortgage?

11. To the eleventh interrogatory he says: The mortgage was delivered to the complainant. The facts are that after the application for loan had been granted by the board of directors of the complainant and the abstract of title to the real property offered as security had been received here the papers in the case were prepared by me and forwarded to Hon. J. W. Buchanan, at Memphis, Tenn., for execution by Bedford. Afterwards the abstract in the case was returned showing the execution and recordation of the mortgage, whereupon moneys in the case were forwarded and

shortly after that the mortgage was returned to the complainant by mail in its present condition, and the complainant has ever since been in possession thereof. I know of nothing that affects the validity of said mortgage. The mortgage I refer to is the only
36 one already in evidence, and is the mortgage executed by the defendants to the association and was delivered to it by them, and the association, the complainant herein, is now the holder and legal owner of said mortgage.

Int. 12. If defendant Bedford ever became a member of complainant association, did he become necessarily bound by all the by-laws, rules and regulations of the association or was there some way by which he might be excepted from their operation, either in whole or in part?

12. To the twelfth interrogatory he says: Bedford was necessarily bound by the by-laws, rules and regulations of the association on becoming a member, and there is no way by which he might be exempt from their operation either in whole or in part.

Int. 13. The answer admits the execution of the 78 notes as alleged in the bill but says that although they were made payable, on their face in New York, they were to be paid in Memphis and such was the contemplation of the parties. What are the facts as to this?

13. To the thirteenth interrogatory he says: The seventy-eight notes referred to were not to be paid in Memphis, and such was not the contemplation of the parties, on the contrary they were to be paid as appears on their face, at the office of complainant in Syracuse, N. Y.

Int. 14. And all of those notes which the association now holds due and lawfully payable to the association, do you know of any equities outstanding in defendants' favor or any reason why complainant is not entitled to collect them?

14. To the fourteenth interrogatory he says: All of the notes which the association now holds are due and payable, and I know of no equities outstanding in defendants' favor, or of any reason why complainant is not entitled to collect them.

Int. 15. At what time was the money loaned to Bedford, sent to him? And why was it sent at that time rather than at any other? State the facts as to the payment of this money to Bedford.

15. To the fifteenth interrogatory he says the money loaned to Bedford was sent him through H. B. Martin, of Memphis, Tenn., on the 8th day of July, 1891. After the notes had been returned here executed by him, together with the abstract of title showing
37 the execution and recordation of the mortgage, also the application for advance referred to in interrogatory 9, together with the affidavit thereto attached. It was sent to him at that time for the reason that no moneys were ever paid on loans until the papers in the case were executed, the mortgage placed of record and the title shown to be all right and free and clear of all liens other than those, if any, which were to be taken up and canceled from the proceeds of the loan, notwithstanding that as soon as the loan was granted the requisite moneys were set apart by the association to

meet the same. In other words as soon as the title to the real property offered as security was approved, the papers upon the loan were duly executed, including the recordation of the mortgage and the continuation of the abstract of title showing the same, and all of said papers with the exception of the mortgage, were received at the home office, the moneys on the loan were forwarded, and not till then. The moneys on this loan were paid by draft of the association on the Trust & Deposit Company, of Onondaga, dated July 8, 1891, payable to the order of H. L. Bedford, and numbered 866. Said draft was sent to him through H. B. Martin with instructions to deliver the same over when said certificate of shares issued to Bedford were delivered over by him (the same not having been previously delivered), he, Martin, being instructed at the same time, to have the attorney, Judge Buchanan, see that everything was all right in every particular before said check was delivered over. Said check was afterwards returned to the complainant by said Trust & Deposit Company canceled and paid. The instrument which I hold in my hand is said check and is hereby made a part of my deposition, marked "Exhibit F., A. P. Fowler, notary public."

Int. 16. The answer denies that the complainant is really a building and loan association. Will you state in detail the general manner in which the complainant does business; whether it is in fact a building and loan association, and whether it is recognized as such under the laws of the State of New York?

16. To the sixteenth interrogatory he says: The complainant is in fact a building and loan association, and is so recognized under the laws of the State of New York. It is incorporated as appears from its charter, under chap. 122 of the Laws of 1851 of said State. Its capital consists of the dues paid in by its members on their certificates of shares; it has no income except from the payments on shares by members and the interest and premium on loans with the penalties for non-payments; it makes no loans to persons other
38 than members, and only on real-estate security or the security of moneys actually paid in in dues on shares; and it transacts no business other than that of issuing certificates of shares to persons applying for the same; collects the dues payable on such certificates and loans the moneys received therefrom as well as from payments on loans to members; its object being to aid members in acquiring homes and paying off encumbrances upon real property by advances or loans on shares held by its members, and for accumulating a fund to be returned to members who do not borrow when the dues paid on their shares together with the earnings thereon amount to the sum of one hundred dollars per share. It does no banking business and strictly confines its business to that I have specified.

Int. 17. Did defendant Bedford accept the money loaned to him; and if so, did he accept it as loaned in pursuance of the provisions of the by-laws, rules and regulations of the association; did he at any time protest against anything done on the way in which it was done, or deny that he was a member of the association? Did he raise any objections at all at any time, if so, what were they?

17. To the seventeenth interrogatory he says: The defendant, H. L. Bedford, accepted the money loaned to him in pursuance of the by-laws, rules and regulations of the association. No protest was ever received from him against anything that was done or the way in which it was done, nor did he deny that he was a member of the association, nor did he raise any objections in relation to the loan at any time.

[L. S.] A. P. FOWLER,
Notary Public.

Int. 18. When the application of Bedford for a loan, if any such application was in fact made, was made, what was done by the association? Was any meeting of the complainant's board of directors held; if so, what was done thereat? And if you have not already done so in response to a previous question, please state here the proceeding had when an application is made for a loan; and whether this usual mode of proceeding was followed in defendant's case.

18. To the eighteenth interrogatory he says: When the application of Bedford for a loan was received by the association at its home office the same was placed in the hands of the loan committee for examination and report to the board of directors. The application and report of the committee was then brought before the
39 board of directors of the association at a regular meeting for its action thereon. A regular meeting of the complanant's board of directors was held on the 18" day of May, 1891, at which meeting the application of Bedford for a loan and the loan committee's report were presented, and upon favorable recommendation of the committee the loan or advance asked for in the application was granted at said meeting. When an application was made for a loan at the time Bedford's application was made, after it had been made in proper form, a report by appraisers acquainted with the property was required to be made and sworn to in the form appearing upon the application of Bedford, after which the application and appraiser's report were forwarded to the association at the home office and was then placed in the hands of the loan committee for report to the board of directors; the loan committee investigating both as to whether the applicant was a member in good standing and had the requisite number of shares of the requisite age, to wit, at least three months old, and whether the real property offered as security was sufficient. The application for a loan, with *with* the committee's report, was then presented to the board of directors at a meeting thereof for its action on the application and the report of the committee. If the application for a loan was granted the same was then placed in my hands as attorney to examine the title and to attend to the drawing and execution of the papers and the closing of the loan. If the title was satisfactory the papers in the case were prepared by me and forwarded to the local attorney with instructions to have the papers properly executed by the applicant, the mortgage recorded and the abstract extended down to and including the time of the recordation thereof, also attend to any matters per-

taining to the title, if any, needing correction or investigation, and then certify as to his opinion upon the abstract, and thereupon to return all of the papers upon the loan, including the certificate of shares and abstract of title extended, with the exception of the mortgage (which would be in course of recordation).

After said papers were received here at the home office of the association, if everything was found to be all right, the moneys upon the loan were forwarded by a check of the association payable to the order of the applicant, with instructions to be delivered over when any liens, if any, appearing upon the abstract ahead of the mortgage to the association were duly discharged of record, or when any other matters, if any, were required to be done to give the association the first lien upon the property offered as security and perfecting all papers and matters securing the loan. This was the usual mode of procedure followed in the making and closing of a loan, and was the mode of procedure followed in the defendant's case.

Int. 19. State whether the loan to Bedford was made in conformity with the rules, regulations and by-laws of the association.

19. To the nineteenth interrogatory he says, that the loan to Bedford was made in conformity with the rules, regulations and by-laws of the association.

Int. 20. If you know of any other facts material to this case, will you state them as your answer to this interrogatory?

20. To the twentieth interrogatory he says: At the time the application for loan was made in this case by Bedford, J. H. T. Martin and H. B. Martin were local solicitors for the association, having the right to receive applications for membership like the application referred to in interrogatory 4. They had no right to write stock and hence it was their duty to forward the applications for membership and shares, or have the same forwarded to the association at the home office. If the same were accepted the stock was written and either mailed to the applicant directly or through the Martins. They had no authority to bind the association in any way, being simply soliciting agents, and had no authority to make loans or enter into any agreement in relation thereto. An application for loan in their territory, after the same had been passed upon by the appraisers, could only be granted or rejected by the directors of the association at its home office. However, the applications for loans were usually forwarded by them or one of them, as was the fact in this case, and the correspondence in relation thereto came from the applicant through them, and the correspondence by the association in relation thereto was addressed to them or to the local attorney, when the matter of execution of the papers upon the loan was under consideration and the moneys on the loan, after the papers had been duly executed and delivered, and received here at the home office, were forwarded to the applicant through them by check, payable to the order of the applicant, with instructions. Their entire compensation consisted of a commission on stock written through them in the association. As will be seen from the foregoing, they were simply soliciting agents, work-

ing upon a commission basis, and having no power to enter into contracts or to incur any obligations for or in be-
41 half of the association. An application for stock was accepted or rejected by the officers at the home office, after it had been received here; likewise an application for loan. In each town outside of the association where it had any considerable business, as was the case in Memphis, Tenn., there was established under the by-laws what is known as a local board, having officers as shown by the by-laws. The purpose of the same was to foster the business of the association in the particular locality and to afford the members of the association connected therewith a means of communication with the association at the home office and to facilitate the transaction of any business which they have with the association. It was established as a matter of convenience for the local members. The officers of the local board, however, had no authority to incur any obligations for or in behalf of the association, and as I have said above, stock could only be issued to persons desiring same by officers of the home office, and loans could only be granted to members desiring the same by the officers and directors at the home office. In the local board there was what is known as a secretary and treasurer, through whom, if the members desired, they could make their remittances of dues or interest and premium on loans to the home office, but it was expressly provided by the by-laws that all payments by the members should be made to the secretary at the home office; and if they chose to remit through the local treasurer it should be through him as agent for themselves, and not for the association. The instrument which I hold in my hand marked "Exhibit G, A. P. Fowler, notary public," is the application by various persons of Memphis for a local board charter for that city, from which it will also be seen that it was the express understanding and agreement that the local board treasurer remitted as agent for the members who made payments to him, and not as agent for the association. At the time the loan in question was made to Bedford and at the time the certificate of shares was issued to him, and for some time thereafter, I. H. T. Martin was the local secretary and treasurer of the Memphis local board. After the consummation of the loan to Bedford the monthly payments represented by the notes executed by him and falling due for a few months subsequent thereto, were sent to J. H. T. Martin for collection. After December, 1891, however, no notes were ever forwarded until the moneys thereon had actually been received at this office.

42 The instrument on the back of the certificate of shares in this case, "Exhibit C" commencing with the words "The within-mentioned shares of stock in the Eastern Building & Loan Association of Syracuse, N. Y., etc.," signed H. L. Bedford (seal) and "dated at Memphis, 7, 16, 1891. Witness, J. H. T. Martin," is simply the form used at the time for pledging the stock as collateral to the loan in compliance with sec. 3 of article XIV of the by-laws printed on the back of said certificate. All shares of stock in the association were written on what is known as the serial plan. All

stock in each series being dated at the same time and treated as a unit in the computation of earnings, each shareholder being entitled to his proportion of the earnings of said series and required to pay his like proportion of dues on his shares. The earnings on the shares were computed from the date of the certificate by the month. Fractions of a month on the serial plan were not and are not considered. All applications for shares received on or prior to the middle of the month were dated on the first day of that month. When, therefore, a loan was granted upon an application in any month, the moneys so agreed to be loaned were at once set aside to the credit of the applicant, and hence all papers upon loans granted in any month were dated in that month, irrespective of the time when the applicant placed himself in position to receive the same by execution and delivery of the requisite papers upon the loan and the perfecting of the real-estate security given therefor. The moneys on the loan being paid to the applicant after the same was granted, just as soon as he became entitled thereto by compliance with the by-laws, rules and regulations of the association.

Int. 21. The various papers herein mentioned, the application for shares, application for advance, the stock certificate, etc., will you please make them exhibits, properly marked, to this deposition.

BUCHANAN & MINOR,
For Complainant Association.

21. To the twenty-first interrogatory he says: The various papers mentioned in my deposition, to wit, the charter of the association, the application for shares by H. L. Bedford, the certificate of forty-six shares issued to H. L. Bedford, the application for loan by H. L. Bedford, and the report of the loan committee thereto attached, the application for advance to which is attached the affidavit of H. L. Bedford, dated June 20, 1891; the check given in payment of the loan and the application of various persons of Memphis for a local board charter, marked respectively:

43 Exhibit A—A. P. Fowler, notary public.
Exhibit B—A. P. Fowler, notary public.
Exhibit C—A. P. Fowler, notary public.
Exhibit D—A. P. Fowler, notary public.
Exhibit E—A. P. Fowler, notary public.
Exhibit F—A. P. Fowler, notary public.
Exhibit G—A. P. Fowler, notary public.

I hereby make and annex to this deposition as a part thereof.

[SEAL.] A. P. FOWLER,
Notary Public.

Cross-interrogatories for Deposition of D. A. Pierce, All Exceptions for Incompetency and Irrelevancy of Testimony Being Reserved.

Int. 1. If you should say you are familiar with the transactions claimed to have been had between the plaintiff, The Eastern Building & Loan Association, and the defendant, H. L. Bedford, then please state whether you have a personal knowledge thereof by

having personally transacted such matters with H. L. Bedford or whether you know of the same simply from having seen papers purporting to have been signed or executed by H. L. Bedford or having heard others speak of such matters.

1. To the first cross-interrogatory he says: My knowledge of the transactions of the complainant with H. L. Bedford is derived and consists of my being familiar with the various papers referred to by me in my direct examination, received by the association and purporting to be signed by H. L. Bedford, and also by virtue of my personal attendance at the meeting of the directors when his application for loan was approved, my preparation of the papers upon the loan in this office, the sending of the check by me payable to his order, in full of the loan and the return of the same canceled and paid by the bank upon which it was drawn, and not by reason of having transacted any of such matters with him personally.

Cross-int. 2. Did you ever see H. L. Bedford personally about any of the matters in question? If so, when, where and what was done —specify particularly.

2. To the second cross-interrogatory he says: I have never seen H. L. Bedford personally to my knowledge.

Cross-int. 3. Is it not a fact that at and before and during the transaction of the various matters claimed to have taken
44 place between the Eastern Building & Loan Association and H. L. Bedford that the Eastern Building & Loan Association had an agency at Memphis, Tennessee, and that all the said transactions were had at Memphis, Tennessee, by H. L. Bedford with said agency at Memphis, Tennessee, and not by him directly with the Eastern Building & Loan Association at Syracuse, New York?

3. To the third cross-interrogatory he says, it is a fact, as I have stated in answer to interrogatory No 20, on my direct examination, that the Eastern Building & Loan Association had a special agency at Memphis, Tenn., but it is not a fact that all of such transactions were had at Memphis, Tenn., by H. L. Bedford with said agency at Memphis, Tenn., though it is doubtless a fact that whatever transactions he had with the Eastern Building & Loan Association, so far as applying for shares and obtaining a loan thereon, was transmitted to the association through either J. H. T. Martin, H. B. Martin or Hon. J. W. Buchanan.

Cross-int. 4. If H. L. Bedford ever had any of the transactions in question with the Eastern Building & Loan Association directly and not through its Memphis agency then please specify definitely and particularly what it was and how you know as to the same.

4. To the fourth cross-interrogatory he says, all of the transactions had with said H. L. Bedford, assuming that his signature is attached to the various papers referred to in my direct examination as well as the notes and mortgages referred to in this action, were had between him on the one hand and the officers of the association at the home office on the other, though all of said papers I believe purporting to be signed by H. L. Bedford were actually sent to the officers of the association at the home office by either said J. H. T.

Martin, H. B. Martin or J. W. Buchanan. All payments of dues on his shares and interest and premium on his loan were made to the association either by himself or his agent, with the exception possibly of some notes falling due on and prior to December, 1891, which were sent by the officers of the association from the home office to J. H. T. Martin for collection.

Cross-int. 5. Is it not a fact that each and every paper purporting to have been signed by H. L. Bedford and referred to by you whether the same be a mortgage or deed of trust, notes or other papers, were received by the Eastern Building & Loan Association from its Memphis agency and not received directly from H. L. Bedford?

5. To the fifth cross-interrogatory he says, I believe it is a fact that all of the papers referred to by me and purporting to have been signed by H. L. Bedford, were received by mail from H. B. Martin.

Cross-int. 6. Is it not a fact that J. H. T. Martin was the agent of the Eastern Building & Loan Association at Memphis, Tennessee, and that all the transactions claimed to have been had by H. L. Bedford with the Eastern Building & Loan Association were had by him with said Martin for said association, and not by him (Bedford) with said association directly. Was not and is not this your information?

6. To the sixth cross interrogatory he says, it is a fact that J. H. T. Martin was an agent of the Eastern Building & Loan Association of Memphis, Tenn., as stated in answer to interrogatory 20 in my direct examination, but it is not a fact that all of the transactions claimed to have been had by H. L. Bedford with the Eastern Building & Loan Association were had by him with said Martin for said association, and not by him, Bedford, with said association directly. This was not and is not my information.

Cross-int. 7. It appears that various of the notes claimed to have been executed by H. L. Bedford and secured by the mortgage or deed of trust mentioned in this proceeding were paid. Please state when such notes were paid and how much were paid—that is the amount thereof. Is it not a fact that each note so paid was sent to Memphis, Tennessee, for payment and was paid to the Memphis agency of said Eastern Building & Loan Association, and that the Eastern Building & Loan Association received such sums from said agency?

7. To the seventh cross-interrogatory he says, the notes claimed to have been executed by Bedford, falling due on the last Saturday of May, 1891, and the one falling due each succeeding month thereafter down to and including the last Saturday in May, 1893, twenty-five in all, each amounting to the sum of $72.86, were paid together with a fine of $9.20, for default in the payment of the February, 1892, note. The dues on the shares falling due on the last Saturday of May, 1891, amounting to $34.50, and embraced in the May note, were paid June 6, 1891, by remittance through the local treasurer. The May and June notes were forwarded for collection to H. B. Martin and the interest and premium on the May note (the dues embraced therein having been previously paid) and

the June note in full, were received at this office on the 6th of August, 1891, and at the same time payment of the July, 1891 note. I have no information as to when the moneys for the aforesaid
46 payments were placed in the hands of H. B. or J. H. T. Martin. The notes falling due on the last Saturday of August, September, October, November, and December, '91, respectively, were forwarded to J. H. T. Martin for collection, and so far as I am able to state the moneys for said payments appear to have been handed to said Martin at or before the time said notes fell due, the remittance for the August note being received at the home office September 11th, '91; for the September note, October 5th, '91; for October note November 9th, '91; for the November note December 21, '91; and for the December note December 31, '91. No notes after December were forwarded for collection and all notes accruing after that time were only canceled and forwarded after the payment had been actually made to the association by the member or borrower personally, or by him through the treasurer of his local board.

Payment of January, '92, note was made to the association February 4th, '92; payment of the February and March, '92, notes were made to the association March 31, '92; $9.20 being paid by way of fines on the February, '92 note for default in payment. Payment of April '92 note was made to the association May 16, '92; payment of the May, '92 note was made June 7th, '92, to the association; payment of the June '92 note was made to the association July 11th, '92; the July '92 note was paid to the association August 3d, 1892; the August note, September 17th, 1892; the September note, October 14th, 1892; the October note November 15th, 1892; the November note December 8th, 1892; the December note, January 11th, 1893; the January, 1893 note, February 10th, 1893; the February, 1893 note, March 9th, 1893; the March, 1893 note, April 12th, 1893; the April, 1893 note, May 10th, 1893; and the May, 1893 note June 16th, 1893. It is not a fact that each note so paid was sent to Memphis, Tenn., for payment and paid to the Memphis agency of said Eastern Building & Loan Association, and that the Eastern Building & Loan Association received such sums from said agency.

Cross-int. 8. In direct interrogatory number 4, your attention has been called to what purports to be an application for shares by H. L. Bedford dated Jan'y 23d, 1891. Please produce with your deposition the original paper and not simply a copy thereof, was said original paper received by the Eastern Building & Loan Association from H. L. Bedford directly or was it received by the Eastern Building & Loan Association from its Memphis agency? If you should say such paper was received from H. L. Bedford directly and not through the Memphis agency, state how you know such to be the fact.

47 8. To the eighth cross-interrogatory he says, the original application for shares purporting to be that of H. L. Bedford, dated January 23d, 1891, is attached to my deposition and marked "Exhibit B, A. P. Fowler, notary public." Said application was received by the Eastern Building & Loan Association by

mail from H. B. Martin, who at the time was one of the soliciting agents of the association at Memphis, Tenn.

Cross-int. 9. In the 6th direct interrogatory you are asked as to a certain certificate of stock in said Eastern Building & Loan Association. Please produce the original, and not simply a copy of any such certificate. If you should say that any such certificate was issued by the Eastern Building and Loan Association at any particular date, then please state how you know such to be the fact?

9. To the ninth cross-interrogatory he says the original certificate of stock in the Eastern Building and Loan Association referred to is produced and attached to my deposition and marked "Exhibit C, A. P. Fowler, notary public." I know of the date of the issuance of said certificate from the entry made on the application for shares and from the time of mailing said certificate.

Cross-int. 10. You are asked in the 6th direct interrogatory whether H. L. Bedford ever accepted the said certificate of stock as to which you are questioned? If you should say he did accept the same, then please state how you know such to be the fact? Were you present when he accepted the same, and if so, when was it, and where was it, and who was present when such acceptence was made, and how was such acceptance made?

10. To the tenth cross-interrogatory he says: I know of the acceptance of said certificate by said Bedford through the papers, purporting to be executed by him in connection with the loan, including what purports to be his signature upon the back of the certificate of shares itself, and payment purporting to be made by him by way of dues thereon prior to the consummation of said loan as well as thereafter, also payment of interest and premium on said loan after its consummation, which, together with the dues on said shares constitute the monthly payment, falling due thereon, and evidenced by said notes. I never saw said Bedford personally to my knowledge.

Cross-int. 11. In direct interrogatory 6 you are asked "what is that printed on the back of the lower half of said certificate"? I suppose this question refers to the following, which I copy from said paper, viz: "The within-mentioned shares of stock in
48 the Eastern Building and Loan Association of Syracuse, N. Y., are hereby withdrawn, and I have this day received the sum of forty-six hundred dollars, in full of the amount due me by reason of such withdrawal. Dated at Memphis, 7, 16, 1891. H. L. Bedford. (Seal.) Witness, J. H. T. Martin." Does not the above date in said paper, 7, 16, 1891, mean July 16, 1891? The said certificate of stock purports to be dated February 2d, 1891, where was the said certificate of stock from said date February 2, 1891, up to the date July 16, 1891, when it is claimed that H. L. Bedford executed the above receipt for $4,600, and where has it been since July 16, 1891? In whose possession was said certificate of stock during all that period? If you should undertake to say that the said certificate of stock was in the possession of H. L. Bedford during the period aforesaid, or at any time, then please state how you know

such to be the fact? Did you see it in his possession or how do you know it to be the fact?

11. To the eleventh cross-interrogatory he says the printed portion on the back of the lower half of the certificate is a copy of the by-laws of the association in force at the time said certificate was issued. The figures 7, 16, 1891, at the end of "the within-mentioned shares of stock, etc.," on the back of said certificate, I suppose means July 16, 1891. I have no personal knowledge of who had possession of said certificate from February 2d, 1891, to July 16, 1891, except that I know that it was not in the possession of the association, and I know this by virtue of having had charge of the loan in this case, and the fact that it was actually received by me through the mails from Memphis, a few days after July 16th, 1891, since which time it has been in the possession of the complainant.

Cross-int. 12. When was the certificate of stock sent to Memphis, Tennessee, by the Eastern Building & Loan Association and to whom was it sent? Was it sent to the Memphis agency of said association or J. H. T. Martin, such agent, or was it sent directly to H. L. Bedford? If sent directly to the said Bedford then please give a copy of the letter which accompanied the same.

12. To the twelfth cross-interrogatory he says: Said certificate of stock was sent by the Eastern Building & Loan Association to J. H. T. Martin, No. 38 Madison street, Memphis, Tenn., by mail, on the 27th day of January, 1891.

Cross-int. 13. The said receipt above copied and dated "Memphis, 7, 16, 1891," purports to show that H. L. Bedford received $4,600 of the Eastern Building & Loan Association. Is it not a fact
49 that H. L. Bedford was not paid $4,600 but was paid a much less sum? What was the sum actually paid and what does the difference between such sum and the $4,600 in the receipt represent?

13. To the thirteenth cross-interrogatory he says: The sum actually paid H. L. Bedford on the loan was $4,140, and the difference between this sum and $4,600 is the gross premium of ten per cent., bid and agreed to be paid by him and deducted from the loan in consideration of his having obtained the preference therefor.

Cross-int. 14. In direct interrogatory number 8 you are asked as to an application for a loan, "marked on back approved May 18, 1891." Please produce the original application and also the original paper now pinned to the same and headed "Report of loan committee." The said application for a loan purports to have been sworn to by H. L. Bedford March 20, 1891, and upon the same paper appears an "appraisers' report" purporting to have been sworn to May 5th, 1891, by Geo. E. Rudisell, C. B. Galloway and J. H. T. Martin. Is it not a fact that the said application for a loan was not turned over to or received by the Eastern Building & Loan Association until after the appraisers' report of May 5, 1891? When were these papers (the application for a loan and appraisers' report attached thereto and the "report of loan committee") received by the Eastern Building & Loan Association and were they received

from H. L. Bedford directly or from the Memphis agency of the Eastern Building & Loan Association? If you should say they were received directly from H. L. Bedford by the Eastern Building and Loan Association state how you know such to be the fact?

14. To the fourteenth cross-interrogatory he says: The original application for loan and report of loan committee are attached to and made a part of my deposition and marked "Exhibit D, A. P. Fowler, notary public." Said application for loan was not received by the Eastern Building and Loan Association until after May 5th, 1891. Said application for loan and appraisers' report attached were received by the association on the 12th day of May, 1891, by mail from H. B. Martin. "The report of loan committee" attached thereto, was made at the home office of the association under directions and for the convenience of its board of directors.

Cross-int. 15. Please state what was the method pursued by the Eastern Building and Loan Association at Memphis, Tennessee, at and during the period of time when the transactions with H. L. Bedford are claimed to have taken place? Did not said association have a local board of organization of some kind at Memphis,
50 Tennessee? How were its "appraisers" and its "loan committees" appointed at Memphis, and how was such association represented in carrying on its business at Memphis, Tennessee? State fully.

15. To the fifteenth cross-interrogatory he says: The method pursued by the Eastern Building and Loan Association at Memphis, at the time when Bedford is claimed to have applied for shares and a loan, and consummated the same is, as I have stated, in answer to interrogatory 20, of my direct examination. There was a local board of the association at Memphis at the time with officers and directors as specified in the by-laws, copy of which is printed on the back of the certificate of shares in this case. The appraisers were appointed by the local board, whose duty it was to certify as to the value of the property offered as security on all applications for loan. The local board had no loan committee. The business of the association consisted in issuing its shares of stock to persons desiring the same and of making loans or advances thereon to such as desired the same after the shares were in force three months, in accordance with the by-laws, rules and regulations of the association. At the time in question J. H. T. Martin and H. B. Martin were authorized to solicit applications for shares, which, when said applications were received were either forwarded directly by the applicant or through said Martins to the association at its home office, for its acceptance or rejection. If accepted, certificates of shares were issued in accordance with the application in form like the certificate in this case, and either forwarded to the applicant directly, or to the applicant through said Martins; and the only compensation they received for doing this work or attending to any matters pertaining to the consummation of a loan, was a fixed commission on the shares so written by them.

After the certificate of shares was issued certain monthly dues were payable, amounting to 75 cents per share, on the last Saturday

in each month, which dues, as well as all other payments owing by a member were by virtue of the provisions of the by-laws payable to the secretary of the association at the home office. If a member saw fit under the by-laws he could make his remittance as aforesaid through the treasurer of his local board, acting as agent for him. If a loan was desired by a member his application was made out upon a printed form furnished, was brought to the attention of the local board, and the appraisers made their report thereon; after which it was transmitted to the association at the
51 home office, where it was passed upon and granted or rejected, as the case might be. If granted, an abstract of title was required to be furnished, and if approved, the papers in the case were prepared by the general attorney of the association at its home office and forwarded to the local attorney for execution, with such instructions as the circumstances in each case might require. After the papers upon the loan had been executed as required the mortgage given as security on the proposed loan was required to be placed upon record, and the abstract of title continued down to and including the date of the recordation thereof after which the abstract, showing the recordation of the mortgage, together with the attorney's opinion, the notes, application for advance, affidavit in relation to title and certificate of shares, were required to be forwarded to the home office. If found satisfactory by the general attorney the money on the loan or advance, less a gross premium of ten per cent. agreed to be paid, among other things, for the preference and privilege of advance or loan on the shares, was forwarded to the applicant through the local soliciting agent of the association or the local attorney by draft of the association, payable to the order of the applicant, with instructions to pay over the same after any liens, if any, existing upon the premises had been canceled or paid, or other matters pertaining to the perfection of the loan had been complied with. The certificate of shares held by the applicant, and upon which he obtained his advance, were by virtue of the by-laws pledged as security for the payment of the loan or advance thereon, and the writing on the back of the certificate in this case referred to, and copied in the cross-interrogatory No. 11 was the form used at the time for the purpose of pledging said shares in compliance with section 3, article XIV of the by-laws. After the consummation of the loan the member or borrower was required by virtue of the provision of the by-laws, and the terms of his notes and mortgage to make the payments on his loan and the dues on his shares at the home office of the association, remitting directly therefor or through the local treasurer as his agent.

Cross-int. 16. The said application for a loan has endorsed on the back thereof "Approved May 18, 1891." Please state how this approval was made? Give a copy from the minute books of the Eastern Building and Loan Association, showing such approval and the date thereof?

16. To the sixteenth cross-interrogatory he says: The ap-
52 proval of the application for loan in question was made by virtue of the action of the board of directors of the association at an adjourned regular meeting, held at its office, in the Kirk block, in Syracuse, N. Y., on the 18th day of May, 1891. I have attached to this deposition a true extract of the minutes of said board, showing such approval, and the same is marked "Exhibit H, A. P. Fowler, notary public."

Cross-int. 17. It appears that the mortgage claimed to have been given by H. L. Bedford is dated May 1st, 1891. Is it not a fact that this mortgage and the notes purporting to be secured thereby, while dated May 1st, 1891, were not in fact executed until after the appraisers' report of May 5, 1891? When were such papers so executed, if you know, and when were the mortgage and notes delivered to the Eastern Building and Loan Association, or its Memphis agency?

17. To the seventeenth cross-interrogatory he says: The notes and mortgage referred to were not executed until after May 5th, 1891. They were executed between May 5, 1891, and June 29th, 1891. The notes received on the 2d of July, 1891. The mortgage recorded was received on the 20th of July, 1891. The notes were received by mail from H. B. Martin. I cannot state whether the mortgage was received by mail through him or from the recorder direct.

Cross-int. 18. If you should state that it was not in the contemplation of the parties to have the notes paid in Memphis, Tennessee, then please state how you know such to be the fact; were you present when the matter or contract was concluded by H. L. Bedford and how do you know what the parties had in contemplation? Is it not a fact that all the notes that were paid were sent to Memphis, Tennessee, for payment, and if so, why was that the case if the parties contemplated having the notes paid in New York? Did not the Eastern Building and Loan Association actually get every dollar that was paid from its Memphis agency, where the payments had been made?

18. To the eighteenth cross-interrogatory he says: I know that it was not in contemplation of the parties that the notes should be paid in Memphis, Tenn., for the reason that the papers upon the loan expressly provided to the contrary.

The contract for the loan to Bedford was concluded at the home office of the association, at the meeting of its board of directors, that I have heretofore referred to, and I was present at that
53 meeting. No one in Memphis had any authority to make any loans or enter into any contracts in relation thereto in behalf of the association. It is not a fact that all the notes that were paid were sent to Memphis, Tenn., for payment, on the contrary, most of the notes were only canceled and forwarded to Bedford either directly or through the treasurer or collector of the local board after the moneys in payment had been actually received at the home office. The association did not get every dollar that was paid from its Memphis agency where the payments had been made. It is a fact, however, I believe, that the payments were received

through J. H. T. Martin, and his successor as local treasurer, but as agent for Bedford.

Cross-int. 19. Were you present when H. L. Bedford got the money, and how do you know how he accepted the same?

Objected to by counsel for complainant, because answer admits acceptance of money as charged in the bill of complaint.

B. & M.

19. To the nineteenth cross-interrogatory he says: I was not present when Bedford got the money, but I know of his acceptance of the same through the return of the check drawn by the association to his order for the amount of the loan, less the gross premium of 10 per cent., and the return of said check to the association canceled and paid, and appearing to be endorsed by him, which check also shows that it was forwarded for collection through the Union and Planters' Bank of Memphis.

Cross-int. 20. In answering direct interrogatory 18th or in stating anything was done by the Eastern Building and Loan Association, please give copies from its minute books showing such facts.

20. To the twentieth cross-interrogatory, he says: The copy of the minutes in relation to the action of the board of directors, "Exhibit H, A. P. Fowler, notary public," is attached, and under the by-laws no other action of the board was necessary to be taken, so far as the same relates to the matters preceding the granting of the loan as well as the closing of the same.

Cross-int. 21. In answering the direct interrogatory, if you should undertake to state what the law is on any subject, or to state defendants are liable, then please state whether you are a lawyer or not and give the sources of your information, and are you referring to law of the State of New York or of the State of Tennessee?

21. To the twenty-first cross interrogatory he says: I am a
54 lawyer and my information is derived from chapter 122 of the Laws of 1851, of the laws of the State of New York, from my knowledge of the charter or articles of incorporation and by-laws of the association; the terms and conditions of the certificate of shares issued to Bedford; the papers upon the loan; the payments made by him therein, as well as upon the certificate of shares prior to the consummation of the loan, as well as my knowledge of the rights and liabilities of members and shareholders in building and loan associations, derived in addition to the sources aforesaid from text-books and authorities on said subject, and I refer to the law of the State of New York as well as to that of the State of Tennessee, so far as applicable.

Cross-int. 22. The "by-laws" of the Eastern Building and Loan Association appear to be printed on the "certificate of shares" which you have been called upon to produce with your deposition. Please state whether those printed by-laws thereon are a complete and correct copy of all the by-laws of said association in force when the transactions with H. L. Bedford are claimed to have been had. If not, produce with your deposition a full and complete and correct copy of all such by-laws then in force?

22. To the twenty-second cross interrogatory he says: The by-laws printed on the back of the certificate of shares are a complete and correct copy of the by-laws of the association, in force when the transactions with Bedford are claimed to have been had.

Cross-int. 23. Please state whether the Eastern Building and Loan Association at the time of the transactions with H. L. Bedford, or at any time since then, or now, own any land in the State of Tennessee? If so, when did such association acquire the same?

FRASER & HEATH,
Solicitors for Defendant.

Objected to by counsel for complainant as irrelevant.

B. & N.

23. To the twenty-third cross-interrogatory he says: The Eastern Building and Loan Association did not own any land in the State of Tennessee at the time of the transaction had with Bedford, nor has it owned any at any time since or now that I know of.

D. A. PIERCE.

Subscribed and sworn to before me this seventeenth day of February, 1896.

[SEAL.] ALBERT P. FOWLER,
Notary Public.

55 "EXHIBIT A. A. P. Fowler, Notary Public."

Whereas, articles of incorporation of the Eastern Building and Loan Association of Syracuse, N. Y., were heretofore filed with the clerk of the county of Onondaga, in the State of New York, under and in pursuance of an act of the legislature of the State of New York entitled: "An act for the incorporation of building, mutual loan and accumulating fund associations," and known as chapter 122 of the Laws of 1851, and the acts amendatory thereof, and, whereas, certain informalities and omissions exist in the original certificates of incorporation, now, therefore, we the directors of said corporation, under and in pursuance of an act of the legislature of the State of New York, passed April 5th, 1870, entitled "An act for the relief of corporations organized under general laws," do hereby make and file the following amended certificate of incorporation, viz:

Articles of Incorporation.

We, the undersigned, hereby associate ourselves together and agree to become incorporated under the provisions of the act entitled "An act for the incorporation of building, mutual loan and accumulating fund associations," and known as chapter 122 of the Laws of 1851 and the acts amendatory thereof and supplementary thereto, under the name of the Eastern Building and Loan Association of Syracuse, N. Y., for the purpose of engaging in and carrying on business as hereinafter mentioned.

I. The name of the corporation shall be the Eastern Building and Loan Association of Syracuse, N. Y.

II. This association is formed for the purpose of purchasing real estate; for the erection of buildings or other improvements, and the improvement of lands; for aiding members in acquiring or improving real estate, or of removing encumbrances thereon by means of advances; for accumulating a fund for the benefit of members who do not obtain advances; and for the purpose of conducting the general business of a building and loan association, and providing the advantages usually expected from savings banks and other institutions of like character.

III. The principal place of business of this association shall be located at Syracuse, N. Y., but branches or agencies may be established and business done in any part of the State of New York or in any State or Territory of the United States as the board of directors may direct.

56 IV. The time of the regular meeting of this corporation shall be the second Monday in May of each and every year, and special meetings may be called at any time upon the written call of a majority of the directors of this association, or of ten or more shareholders therein. A quorum shall consist of not less than a representation of at least five hundred (500) shares of stock of said association; and not less than one-half of said directors, in cases where a directors' meeting shall be found necessary.

V. The qualification of members shall be as follows: Any person upwards of twenty-one years of age, or parents or guardians of children, may become members of this association, and shall become such upon subscribing for two or more shares of stock in this association as prescribed by the by-laws thereof.

VI. The management of all the business of the association shall be vested in a board of nine directors, who shall be chosen at each regular meeting. Said board shall have full power and authority to fill all vacancies and make such by-laws, rules and regulations for the general management and conduct of the business of this association as they may deem necessary. The officers of this association shall consist of a president, vice-president, secretary and general manager (combined), and treasurer, who shall be chosen by and from the board of directors at their first regular meeting after the annual meeting of the association; an attorney, who shall at the same time, be chosen by the board of directors from their number, or from one of the stockholders. Said officers to receive the vote of a majority of said board present at any meeting. And said board of directors shall in the same manner also designate a trustee who shall be chosen at its first regular meeting. Any of the officers, the trustee and attorney of this association may be removed or suspended from office by a majority of the board of directors and a majority of the number of shares of stock of said association.

VII. The duties of the several officers shall be as follows: The directors shall — upon the sufficiency of all property offered as security for loans and attend generally to the financial affairs of the association as provided by the by-laws to be hereafter adopted. It

shall be the duty of the president to preside at all meetings of the shareholders and of the board of directors; to sign certificates of stock and sign all releases of mortgages, and he shall perform all other duties pertaining to said office as provided by the by-laws to be hereafter adopted. The vice-president shall perform all the
57 duties of the president in his absence. It shall be the duty of the secretary and general manager to attend all meetings of the shareholders and board of directors; to receive all moneys paid into the association and to pay the same over to the treasurer and take his receipt therefor; he shall keep all accounts of the association; conduct all correspondence, sign all orders on the treasurer, and sign all certificates of stock under the direction of the board of directors; whenever required by the board he shall submit a statement of the financial affairs of the association. The books of the association shall be kept by him and shall at all times be subject to the inspection of the board. He shall receive from the attorney, after being recorded, all deeds or other documents pertaining to the business of the association and make proper entry of the same in books kept for that purpose. He shall attend to all printing and publication and have general supervision over all agents and agencies of this association, and any further duties as may be prescribed by the by-laws, to be adopted. It shall be the duty of the treasurer to receive all moneys from the secretary and deposit the same in the name of the association in such bank as shall be designated by the board of directors. He shall keep correct accounts of all moneys received and paid out by him. He shall make to the board of directors, when required, a statement, in writing, of the full business of his office. It shall be the duty of the attorney to examine all abstracts and records relating to the title of real estate offered as security for loans, and certify, in writing, to the board of directors all facts that might affect the interests of the association in case such security may be accepted. He shall prepare all papers incident to making loans and secure loans by the association and cause them to be properly executed and such other duties as may be required by the by-laws of this association.

VIII. All officers holding responsible positions shall execute to the association such bonds for the faithful performance of their duties as the board may require.

IX. The entrance fee of new members and new shares shall be one dollar ($1.00) per share of stock in said association. The monthly dues per share shall be seventy-five cents ($0.75). There shall be a transfer fee of two dollars ($2.00) on each and every certificate of shares transferred. The fines for non-payment of dues shall be ten cents ($0.10) on each and every share of stock unpledged and twenty cents ($0.20) on all stock pledged for each and
58 every month the payment may be in arrears. In case a monthly payment on any share shall become past due and payable for a period of six months or more such share shall be sold for the purpose of paying the arrearages. The proceeds of the sale shall first be used to pay all back monthly payments and fines and the balance remaining after paying all accrued fines and monthly

payments shall be paid to the member in whose name the stock stands at the time of sale. If the stock brings no more than enough to pay the accrued fines and monthly payments, it shall be bid in by the association and canceled, and the amounts standing to the credit thereof in the loan fund shall be divided among the other shares as profits.

X. The advances or loans made to any member of this association shall not exceed the face value of the stock owned by him, and except as hereinafter stated shall be upon satisfactory first mortgages, real-estate security, and be under such rules and regulations as the by-laws and the board of directors may require. Loans may be made upon shares in good standing and in force one year to an amount not exceeding 90 per cent. of the monthly dues paid to the association upon such shares as collateral security, and upon such notes, bond or other obligation or instrument as the board of directors and by-laws may require. A uniform premium of 10 per cent. shall be paid and allowed by the borrower upon each loan; and upon all loans the borrower shall pay interest at the rate of 5 per cent. per annum and a premium of 5 per cent. per annum as a redemption fee and the same shall be paid on the last Saturday of each month during the continuance of said loan at the principal office of the association. In case the monthly installments or loans are not paid as aforesaid, then interest at the rate of 6 per cent. per annum payable semi-annually shall be collected thereon; and in case of default, shall be made in the payments of the regular monthly installments, fees or dues, the association may compel payment of principal, interest and premiums, assessments, fees or dues by proceeding upon the note, or other obligation and mortgage, which shall at once become fully due and payable, and the association may cancel and treat as forfeited the shareholder's shares of stock, whether deposited as collateral security or not, and all payments previously made thereon, shall be forfeited to the association. Pledged shares may be transferred upon consent of the association by transferring the mortgage security upon payment of the fee therefor, provided all assessments, installments, dues and
59 charges thereon are paid to date, and subject to such other regulations, if any, as the by-laws may provide. Any shareholder may have his mortgage transferred or changed from one piece of property to another by giving thirty days' notice in writing, the shareholder to pay all expenses incurred by the transfer of the same. Loans may be prepaid and the mortgaged property released upon application to the association, and giving thirty days' notice in writing of the intention. An equitable discount shall be allowed therefor to be determined by the board of directors.

XI. Unpledged shares may be transferred upon consent of the association upon payment of the fee therefor, provided that all dues and claims thereon have been paid to date.

XII. Shares which are not pledged may be withdrawn before maturity, provided the same are in good standing and all dues and fines have been paid to date. The association shall have the right to require at least thirty days' prior notice of intention to withdraw.

Upon such withdrawal the holder will be entitled to receive thereon the amount of the monthly installments that have been paid with such additional interest, if any, as the by-laws may provide, except that the same shall not exceed the net earnings of said stock. But in no event shall the association be required to pay to withdrawing members more than one-half of the net receipts of the monthly installments paid in during the month in which the withdrawal occur-. In no case shall a withdrawal from the loan fund exceed the amount of the installments paid thereto, together with the estimated amount of the earnings upon the same.

XIII. The association shall have the right to mature any shares of one year's standing and to issue in the place thereof, paid-up certificates of shares payable at maturity, with interest at the rate of 6 per cent. per annum or at maturity of stock in pledge payable at maturity of loan. It shall also have the right to cancel any unpledged certificate of shares after it has been in force three years upon the payment to the holder of the total amount of installments paid thereon, together with interest thereon at the rate of 8 per cent. per annum to date of cancellation.

XIV. The qualification of voters at a meeting shall be that they are members in good standing as provided by the by-laws and be entitled to one vote for each share of stock held. Voting shall be by ballot, and the highest number of votes shall elect. Any member may authorize another member by written proxy to vote
60 his stock at any meeting, provided such proxy shall specify the particular meeting at which the same is to be used, and the same shall be filed with the secretary at the home office at least twenty days before the opening of such meeting. In all other cases the proxy given with the application for stock shall be operative.

XV. The amount to be paid to the owners of shares at maturity shall be one hundred dollars ($100) per share.

XVI. The by-laws of this association shall not be amended except — an annual meeting of said association and by a majority vote of the stock outstanding.

XVII. The amount of capital stock of this association shall be fifty million dollars ($50,000,000), divided into shares of one hundred dollars ($100) each, as provided by the by-laws. The funds of this association shall be divided into two classes, which shall be called, respectively, the loan fund and the expense fund. The expense fund shall consist of all admission, transfer, insurance, abstract, and attorneys' fees, amounts paid for insurance or taxes on property on which loans have been made, fees, costs, and disbursements of foreclosure, together with ten cents per share per month from the monthly payments on stock, and these funds so constituted, shall be devoted to the payment of operating expenses and said insurance and taxes. The loan fund shall consist of all receipts which do not go into the expense fund as hereinbefore provided, together with all interests and accumulations from whatever source. No money can be drawn from the loan fund for any other purpose than the making of loans on security as provided by the by-laws and to pay amounts due withdrawing shareholders. The funds of

the association not required for advances on shares may be invested by the board of directors in such securities as the savings banks of the State of New York are permitted to take or deposited at interest in the savings banks, trust companies or duly incorporated banks of said State, and which are in good standing.

XVIII. The stock of this association may be issued in series if the board of directors may so decide. The directors of the association may enter into such contracts and agreements and appoint such agents for its business management as they may deem for the best interest of its affairs.

XIX. These articles of incorporations may be amended at any annual or special meeting of the association, provided the same is previously endorsed by resolution of the board of directors
61 and adopted by a majority vote of stock of the association.

Dated Syracuse, February 22d, 1890.

HENRY H. LOOMIS.
DWIGHT H. MURRAY.
JNO. J. W. REYNOLDS.
LUCIUS M. KINNIE.
WILLIAM H. EMERY.
CHARLES A. POOLER.
ALEX. H. HUBBS.
ARTHUR B. KINNIE.
ROBERT W. ANDREWS.

STATE OF NEW YORK, }
Onondaga County, } *ss:*

On this February 22d, 1890, before me, the subscriber, personally appeared Henry H. Loomis, Dwight H. Murray, Jno. J. W. Reynolds, Lucius M. Kinne, William H. Emery, Charles A. Pooler, Alexander H. Hubbs and Robert W. Andrews, to me known to be the persons named in and who executed the foregoing certificate and duly and severally acknowledged that they executed the same.

E. A. CHRISTY,
Com'r of Deeds, Syracuse, N. Y.

The foregoing articles duplicated in the original, signed and dated as follows:

Dated Syracuse, February 22d, 1890.

HENRY H. LOOMIS, *President.*
DWIGHT H. MURRAY,
Vice-President.
JNO. J. W. REYNOLDS,
Secretary and General Manager.
LUCIUS M. KINNIE, *Treasurer.*
SAMUEL R. STERN, *Attorney.*
WILLIAM H. EMERY,
CHARLES A. POOLER,
ALEXANDER H. HUBBS,
ARTHUR B. KINNE,
ROBERT W. ANDREWS, *Directors.*

SYRACUSE, *February* 22, 1890.

At a meeting of the undersigned incorporation of the Eastern Building and Loan Association, held at the rooms of the
62 State Bank of Syracuse, in the Syracuse Savings Bank building, Syracuse, N. Y., the following proceedings were had:

Said Eastern Building and Loan Association effected a temporary organization by calling a meeting to order at 4 p. m., by electing as temporary president Henry H. Loomis, and Jno. J. W. Reynolds, secretary. The articles of incorporation, a copy of which is hereto annexed, were duly signed and executed by all present. By-laws were adopted after a full discussion of the same. The following officers were then elected, as provided by said articles of incorporation and said by-laws:

Henry H. Loomis, president.
Dwight H. Murray, vice-president.
Jno. J. W. Reynolds, secretary and general manager.
Lucius M. Kinnie, treasurer.
Samuel R. Stern, attorney.

Directors: Henry H. Loomis, Dwight H. Murray, Jno. J. W. Reynolds, Lucius M. Kinnie, Alex. H. Hubbs, Charles A. Pooler, William H. Emery, Robert W. Andrews, Arthur B. Kinnie.

The place of business designated as Syracuse, N. Y., and the location at present 83, 84 and 85 Writing block. The articles herein annexed are a true copy of the certificate of incorporation signed by the foregoing members and incorporators.

JNO. J. W. REYNOLDS,
Secretary and General Manager.

COUNTY OF ONONDAGA, *ss:*

John J. W. Reynolds, being duly sworn, says that he is one of the officers, to wit, the secretary and general manager of the Eastern Building and Loan Association of Syracuse, N. Y.; that he has read the foregoing certificate and minutes and knows the contents thereof, and that the same is a true copy and record of the certificate
63 of incorporation and of the minutes of the first meeting and the transactions had thereat with reference to the business of said association. JOHN J. W. REYNOLDS.

Sworn to before me this 25th day of February, 1890.

L. A. CHRISTY,
Com'r of Deeds, Syracuse, N. Y.

In witness whereof, we, the directors of said association have hereunto subscribed our names at the city of Syracuse, N. Y., this 16th day of December, 1890.

HENRY H. LOOMIS.
DWIGHT H. MURRAY.
JNO. J. W. REYNOLDS.
LUCIUS M. KINNIE.
WILLIAM H. EMERY.
CHARLES A. POOLER.
ALEX. H. HUBBS,
ARTHUR B. KINNIE.
ROBERT W. ANDREWS.

STATE OF NEW YORK, } ss:
County of Onondaga, City of Syracuse, }

On this 16th day of December, A. D. 1890, before me, the subscriber, personally came Henry H. Loomis, Dwight H. Murray, John J. W. Reynolds, Lucius M. Krine, William H. Emery, Charles A. Porter, Alexander H. Hubbs, Arthur B. Krine and Robert W. Andrews, to me personally known and known to be the same persons described in and who executed the foregoing instrument and severally acknowledged that they executed the same.

[L. S.]

J. B. VISSCHER,
Notary Public, Onondaga Co., N. Y.

(Endorsed:) Filed Dec. 17, 1890. Recorded Dec. 17, 1890, at 4.45 p. m. Geo. G. Catton, clerk. (Book N of Mis. Records, page 480, etc.)

STATE OF NEW YORK, } ss:
Onondaga County, }

CLERK'S OFFICE.

I, De Forest Suttle, clerk of said county and of the supreme and county courts therein, which are courts of record, do hereby certify that I have compared the foregoing copy of the amended articles of incorporation of the Eastern Building & Loan Association of Syracuse, N. Y., with the original record thereof now remaining
64 in this office, and that the same is a correct transcript of said original, and of the whole thereof, and of the endorsements thereon. In witness whereof, I have hereunto set my hand and affixed the seal of said county and courts, at the city of Syracuse, this 21 day of December, 1894.

[SEAL.]

DE FOREST SETTLE, *Clerk.*

"EXHIBIT B." A. P. Fowler, Notary Public.

O. K. Sup't.	Cashier.	Stock.	A. F., 1, 26, '91. Recorded.	Indexed.	Filed.	Mailed.

46 shares. Number 4773.

Application for Shares in the Eastern Building and Loan Association of Syracuse, N. Y.

Agent, J. H. T. Martin.

I, H. L. Bedford, of Bailey, county of Shelby, State of Tennessee, No. of street or P. O. box, —; occupation, farmer; hereby apply for membership in the Eastern Building and Loan Association of Syracuse, Onondaga county, New York, and subscribe for 46 shares of installment stock.

I hereby agree to abide by all the terms, conditions and by-laws contained or referred to in the certificate of shares, and will also comply with all the rules and regulations of said association, and

do also hereby, in order to facilitate the transaction of business of the Eastern Building and Loan Association of Syracuse, N. Y., make, constitute and appoint the secretary of said association for me, in my name, place and stead, to appear and vote as my proxy upon any and all shares of stock at any time held by me, or standing in my name in said association during my absence, at any and all meetings of stockholders or directors and upon any and all matters which may properly come before any such meetings and attorneys, one or more under him, from time to time in writing to appoint, hereby authorizing, ratifying and confirming all that *any* said
65 attorney, or his substitute, may do, or cause to be done as such proxy by virtue hereof. This proxy is not in any manner to affect my right to vote on all such stock whenever I am personally present at any stockholders' meeting.

In witness whereof I have hereunto set my hand and affixed my seal this 2d day of Jan'y, A. D. 1891.

Signature of applicant, H. L. BEDFORD. [SEAL.]

H. B. MARTIN, *Witness.*

The price of stock must accompany this application.

Endorsed.

Instructions to Agents.

This application should always be written in ink. All blank places should be filled correctly and plain to avoid any chance of error in the home office. Be particularly careful to have the name of applicant written plain and spelled correctly, and where there appears any possible chance for misreading any word. Agents should use the space at the bottom of application for explanation. The admission fee must accompany the application before the stock can be written at the home office.

Send certificate of shares to :

Name —— ——.

P. O. ——.

County ——, State ——.

Report of Loan Committee.

Application No. 165 of H. L. Bedford, Bailey, Tenn., $4,600, certificate No. 4776, 46 shares.

8. The title is in the name of H. L. Bedford.
9. The description is 400 acres of land, 260 cult.
16. The buildings on the property are 1½ house, 7 rooms, cistern, well, city water, bath-rooms, 40 x 60 hard or soft wood finish.
23. Has 40 x 60 barn, value $200.
25. Has owned the property 5 years.
26. Paid $6,000.
32. It is unencumbered $—.
34. The kind of building to be built is —.

35. Cash value $—.
37. Will carry insurance to the amount of $—.
66 44. — he — wants the money *to* for investment to release other property.
47. The applicant owns property valued at $40,000.
49. The property would bring in cash $6,000.
50. Would bring at forced sale $6,000.

The committee—approve the loan and recommend that it be—granted subject to usual conditions & L. B. R.

A. H. HUBBS,
— —,
— —,
Loan Committee.

"EXHIBIT C." A. P. Fowler, Notary Public.

Series No. B 2. Maturing August 1st, 1897. Eastern Building and Loan Association of Syracuse, N. Y.

Certificate number 4773; number of shares, 46; amount, $4,600.

This certifies that H. L. Bedford, of Bailey, county of Shelby and State of Tennessee, is hereby constituted a shareholder of the Eastern Building and Loan Association of Syracuse, New York, incorporated under the laws of the State of New York and holds forty-six shares therein of one hundred dollars each, and in consideration of the membership fee, together with agreement and statements contained in the application for membership in the association, and full compliance with the terms, conditions and by-laws printed on the front and back of this certificate, which are hereby referred to and made a part of this contract, and the said Eastern Building and Loan Association of Syracuse, New York, agree to pay said shareholder or his heirs, executors, administrators or assigns the sum of one hundred dollars for each of said shares at the end of seventy-eight months from the date hereof *on* in case of his death prior to the expiration of seventy-eight months, the association will pay the sum of all monthly installments paid on this certificate with interest at 6 per cent. per annum, payable in the manner and upon the conditions set forth in said terms, conditions and by-laws hereto attached. All payments under this certificate are payable at home office of the association at Syracuse, New York, within sixty
67 days after the acceptance and approval of satisfactory proofs.

This certificate of shares is issued to and accepted by the holder thereof upon the following express terms and conditions:

First. The shareholder agrees to pay or cause to be paid, a monthly installment of seventy-five cents on each share named in this contract, the same to be paid on or before the last Saturday of each month until such share matures or is withdrawn.

Second. If the shareholder shall fail to pay or cause to be paid any monthly installment on or before the last Saturday of each month, he shall pay a fine of ten cents per share for each and every month the payment may be in arrears.

Third. Stock in this association is non-forfeitable; but if a monthly payment on any share becomes past due and payable for a period of six months or more, such share shall be sold at auction for the purpose of paying the arrearages. The proceeds of the sale shall first be used to pay all back monthly payments and fines; the balance remaining after paying all accrued fines and monthly payments shall be paid to the member in whose name the stock stands at the time of sale. If the stock brings no more than enough to pay the accrued fines and monthly payments it shall be bid in by the association and canceled, and the amount standing to the credit thereof in the loan fund shall be divided among the other shares as profits.

Fourth. Any member may withdraw their monthly installments at any time by first giving thirty days' notice, and will receive 6 per cent. annual interest on all shares of six months' standing and up to two years; the third year's 7 per cent.; any time after the third year and before maturity 8 per cent.

Fifth. If a shareholder dies his personal representative may withdraw his shares at any time or continue on to maturity.

Sixth. At stated periods the profits arising from interest, premiums, fines and other sources, shall be apportioned among the shares in good standing.

Seventh. All payments must be paid to an authorized agent, or sent to the secretary at the home office by draft, express or money order, or registered letter. Individual drafts or checks not receivable.

Eight. The association reserves the right at any time to make an investigation in all cases prior to the approval of claims.

68 Ninth. The by-laws of this association, which are attached to and indorsed hereon, are a part of this contract, and such by-laws and this certificate are to be construed together as part of the contract between the association and the shareholder.

Tenth. No shares shall be assignable or transferable on the books of the association, except by the shareholder paying a transfer fee of two dollars for entering the same, and upon consent of the association, indorsed thereon by the secretary after all dues and claims on the same have been paid.

Eleventh. It is agreed by all shareholders of this association that desire loans, that all money in the loan fund shall be sold at a uniform rate of ten per cent., bid as premiums on all loans.

Twelfth. No shareholder shall have any claim to any interest in the affairs, assets or funds of this association, nor the control of them, except as above specifically set forth, and assumes no further liability of any kind whatsoever except as hereafter described.

Thirteenth. In every case where this contract shall cease and determine, or become null and void, then all payments made thereon shall become forfeited to the association.

Fourteenth. Any action brought against this association shall be commenced within six months after filing proofs, and in the county of Onondaga and State of New York.

Fifteenth. No agent has authority to change this contract in any

way, and the association assumes no obligation for any statements not contained in its printed literature.

Given under the seal of said association at Syracuse, New York, the second day of Feb'y, A. D. 1891.

H. H. LOOMIS, *President.*

[L. S.] JNO. J. W. REYNOLDS,
Secretary and Gen'l Manager.

Eastern Building and Loan Association.

By-laws.

Article I.

Name, object, location, and duration.

SECTION 1. The association shall be known as the Eastern Building and Loan Association of Syracuse, N. Y.

SEC. 2. Its object is to afford its members a safe and profit-
69 able investment of their savings, to facilitate the purchase and improvement of real estate and provide the advantages usually expected from savings banks and other institutions of like character.

SEC. 3. The principal place of business of this association shall be located at Syracuse, N. Y., but the branches or agencies may be located and business done in any part of the State of New York, or in any other State or Territory of the United States where no legal prohibition exists, by authority of the board of directors, to be evidenced by a vote of a majority of the board, and spread upon its records.

SEC. 4. This association shall continue for forty years.

Article II.

Capital stock.

SECTION 1. The capital stock of this association shall be fifty million dollars divided into shares of one hundred dollars each.

SEC. 2. All stock shall be issued on monthly series, dated on the first day of the month of its issue. Each shareholder in good standing shall be entitled to one vote for each share of stock held by him, and on which all dues have been paid, at all meetings of the shareholders.

Article III.

Directors and officers.

There shall be elected by ballot nine directors of this association at the annual meeting thereof by a majority of the stock represented and voting.

SEC. 2. The officers of this association shall consist of president, vice-president, secretary and general manager (combined) and treasurer, to be elected by and from the board of directors. All vacancies in the board of directors caused by death, resignation or

otherwise, and all vacancies from any cause, shall be filled by the board of directors until the next annual meeting of the association.

SEC. 3. The officers and directors of the association shall receive such salaries as the board of directors may deem advisable, provided the same must always be paid from the expense fund.

SEC. 4. All bonds to this association from any officer shall first be approved by the board of directors.

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Article IV.

SECTION 1. The annual meeting of the stockholders shall be held at the home office of the association on the second Monday of May of each year commencing with the year 1891, between 2 and 4 o'clock p. m., of which due notice shall be given according to law.

Article V.

Board of directors—meeting and duties.

SECTION 1. Stated meetings of the board shall be held monthly on the first Tuesday of each month. Special meetings may be called by the secretary, or by request of two or more members of the board.

SEC. 2. It shall be the duty of the board of directors to pass upon the sufficiency of all property offered as mortgage security for loans, and attend generally to the financial affairs of the association. They shall have the management of the association not otherwise provided for in the by-laws and the right to disburse such amounts as may be necessary to properly conduct the business of the association. They shall cause the secretary to mail to each shareholder, after each annual meeting, a general statement of the business of the preceding year and a report of the financial condition of the association as found by them after a thorough examination. A majority of the board shall constitute a quorum for the transaction of any business.

Article VI.

President and vice-president.

SECTION 1. It shall be the duty of the president to preside at all the meetings of the shareholders and of the board of directors, to sign all certificates of stock and sign all releases of mortgages, and to perform all other duties usually appertaining to this office.

SEC. 2. The vice-president shall perform all the duties of the president in his absence. In case of any vacancy in that office he shall be *ex officio* president until the vacancy is filled.

Article VII.

Secretary and general manager.

SECTION 1. It shall be the duty of the secretary and general manager to attend all meetings of the shareholders and board of

directors; to receive all money paid into the association, and
71 to pay the same over from time to time, to the treasurer and take his receipt therefor, and keep all amounts of the association between the association and the shareholders; issue all notices; conduct all correspondence; draw and sign all orders on the treasurer; and sign all certificates of stock under the direction of the board.

SEC. 2. Whenever required by the board, he shall submit a statement in writing of the financial affairs of the association. The books of the association shall be kept by him, and at all times be subject to the inspection of the board. He shall under the direction of the board of directors, see to the settlement of all claims and bills, and shall keep insured all interest the association may have in any building or property liable to loss by fire; with the assistance of the attorney of the association, he shall protect its interests in all tax sales or forfeitures or foreclosures of property in which it may hold any interest, and for these purposes is authorized to draw on the treasurer without further action of the board of directors, such payments to be reported at the next meeting of the board of directors. He shall receive from the attorney, after being recorded all deeds or other documents pertaining to the business of the association, and shall make proper entry of the same in books kept for that purpose. He shall give bond, to be approved by the board of directors, for the benefit of the association, conditioned for the faithful performance of the duties of his office and the direction of the board of directors.

SEC. 3. It shall be his duty, as general manager, to attend to all advertising, printing and publications; look after all bonds of agents, local and special; look after all property that is offered for security, and report the same to the board, and to have the general supervision over all agencies, to appoint agents, assistants and other necessary help.

Article VIII.

Treasurer.

SECTION 1. It shall be the duty of the treasurer to receive all moneys from the secretary and deposit the same in the name of the association in such bank as shall be designated by the board of directors, signed by the secretary. He shall keep correct account of all moneys received and paid out by him. He shall deposit with the trustee all abstracts of title, deeds, bonds, mortgages, contracts and other securities belonging to the association. He shall make
72 to the board of directors, when required, a statement in writing or otherwise of the full business of his office. He shall furnish a satisfactory bond, to be approved by the board of directors, for the benefit of the association, conditioned for the faithful performance of the duties of his office, in conformity with the by-laws and the order of the board of directors.

Article IX.

Attorney.

SECTION 1. It shall be the duty of the attorney to examine all abstracts and records relating to the title of real estate offered as security for loans and certify in writing to the board of directors all facts that might affect the interests of the association, in case such security may be accepted.

SEC. 2. He shall prepare all papers incident to making sales and securing loans by the association, cause them to be properly executed, file the same for record in the proper office of the county, and when so recorded deliver the same to the secretary, and in general do and perform all things incident to his office.

Article X.

Official bonds.

SECTION 1. All officers holding responsible positions shall execute to the association such bonds for the faithful performance of their duties as the board of directors may require.

Article XI.

Funds.

SECTION 1. The receipts of said association shall be divided into two classes, which shall be called respectively the loan fund and expense fund. The expense fund shall consist of all admission, transfer, insurance, abstract and attorneys' fees, amounts paid for insurance or taxes on property on which loans have been made, fees, costs and disbursements of foreclosure, together with ten cents per share per month from the monthly payments on stock, and this fund so constituted shall be devoted to the payment of operating expenses and said insurance and taxes.

SEC. 2. The loan fund shall consist of all receipts which do not go to the expense fund, as hereinbefore provided, together with all interest, fines, earnings and accumulations from whatever source. No money can be drawn from the loan fund for any other purpose than the making of loans on security, as provided by the by-laws, and to pay amounts to withdrawing shareholders.

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Article XII.

Eligibility.

SECTION 1. All new shareholders elected or appointed as directors or officers of this association shall concur in and accept the previous resolutions, agreements and obligations of said association, and shall only become eligible to such position after having performed all personal obligations agreed upon prior to their election or appointment.

SEC. 2. Persons not of lawful age can only become shareholders through their lawfully appointed guardians, who shall sign the application as provided by law.

Article XIII.

Elections and inspectors.

SECTION 1. At the stated meeting of the board of directors next preceding the day appointed for the annual meeting, there shall be elected by the board of directors three shareholders, not candidates for election, to act as inspectors thereof who shall receive the votes, count the same, and report in writing the names of the persons having the greatest number of votes, who thereupon shall, by the president, be declared duly elected, whereupon the secretary shall give notice to such directors. Any member may authorize another member by written proxy to vote his stock, provided that all proxies shall be filed with the secretary at the home office at least twenty days before the opening of the meeting at which they are to be used.

Article XIX.

Contract of members.

SECTION 1. The terms and conditions expressed in the certificate of stock, in connection with the application for membership and the by-laws of the association, *from* the contract between the association and each shareholder therein.

SEC. 2. All persons desiring to become shareholders of this association must fill out, sign and deliver to the secretary an application according to the form adopted by the association, which said application shall be a part of said application with this association. Such applicant shall also pay a membership fee of one dollar per share for each and every share held by him.

SEC. 3. All loans made by this association shall be upon satisfactory note and first mortgage secured on real estate, together
74 with fire-insurance policy in some approved company, if upon improved property, and for every one hundred dollars of loan made to a shareholder, who shall in addition thereto transfer in pledge to the association one share of the stock held by said shareholder as collateral security on all loans made by the association to a shareholder. Said shareholder shall pay an interest of five per cent. per annum and a premium of five per cent. per annum *and a premium of five per cent. per annum* on all said loans. All interest and stock payments shall be paid on the last Saturday of each month during the continuance of said loan, and at the same time the shareholders not borrowing shall pay their monthly payments as the principal office of the association.

SEC. 4. Abstracts of title must be furnished by the borrower, also the legal examination and opinion of the attorney of this association that the title to the property offered as security is clear and owned in fee-simple, and he must so report. All such abstracts, searches and attorneys' fees, and all fees for recording, drawing and canceling mortgage are to be paid by the borrower.

SEC. 5. Borrowing members who shall neglect to pay any installments on stock and interest on their loans, as the same become due,

shall pay to the association a fine of twenty cents per month on each one hundred dollars that they may have borrowed from the association. Non-borrowing members who shall neglect to pay their monthly installments promptly shall pay to the association a fine of ten cents per month on each share of stock owned by them.

SEC. 6. Should a shareholder whose property is mortgaged to the association desire to release the same by prepayment of his indebtedness, he may, on application to the association, be allowed to do so by giving thirty days' notice in writing of such intention, and be allowed an equitable discount therefor, to be fixed by the board of directors.

SEC. 7. Any shareholder may have his mortgage transferred from one piece of property to another, by giving thirty days' notice in writing, the shareholder to pay all expenses incurred by the transfer of the same.

SEC. 8. Any shareholder may sell or transfer property mortgaged to the association, and the purchasers must assume all stipulations, agreements and conditions of the original mortgagor by a proper instrument in writing, to be paid for at his own expense. Said person purchasing must also purchase the shares held by said shareholder, which will be transferred on the books of the association to said purchaser; all assessments or installments thereon being paid up to time of transfer upon payment of fees therefor; or the association may accept a new mortgage from said purchaser to secure the former loan until the expiration of said loan, upon the same or other sufficient property, upon payment of all fees and expenses thereof.

SEC. 9. All deeds, notes, leases or other written instruments requiring to be executed, and all satisfactions and releases of mortgages and other indebtedness ordered by the board of directors, shall be signed in the name of the association by the president, or in his absence by the vice-president, and countersigned by the secretary, and when necessary acknowledged by the president and secretary of the association in their official capacity, and have the corporate seal attached.

SEC. 10. If any shareholder or any person shall neglect to pay the interest or installments on his loan, or the regular monthly installments, fees or dues for six (6) months, the secretary may compel payment of principal, interest and premiums, assessments, fees or dues, by proceeding on his note and mortgage, which shall at once become fully due and payable, and the association may cancel and treat as forfeited the said shareholder's shares of stock, whether deposited as collateral security or not, and all payments previously made thereon shall be forfeited to the association. Punctuality and strict performance on the part of all members, borrowers and shareholders, in payment of fines, dues, interest, loans and premiums, are made the essence of the contract.

SEC. 11. Any shareholder may pay his installments, interest and premium in advance, or deposit with the association a certain sum to be used for such payments as they may fall due, and the association will receipt for the same and notify when said deposit is ex-

hausted. If members make payments in advance for a period of six months and not over two years a discount may be allowed at the rate of seven per cent. per annum for the time each payment is actually advanced.

SEC. 12. Any shareholder who has made a loan by giving taxable property as a security shall be bound to pay all State or city or other taxes or assessments as they become due, in addition to all other payments, and his failure to do so, will make his loan, notes, mortgages, premiums and interest at once fully due and payable at the option of the board of directors.

SEC. 13. Each share of stock shall be charged with any and all amounts that may be owing from the shareholder or of his
76 assigns, to the association, whether in dues, loans, fines, interest or premiums, and all certificates of stock in said association shall, whether mentioned therein or not, be subject to a lien thereon, to secure any such indebtedness, and the right to deduct and withhold the amount of any such indebtedness is hereby expressly reserved to the association.

SEC. 14. All shareholders shall pay or cause to be paid a monthly installment of seventy-five cents on each share named in their certificate, until the same shall be fully paid; said installment to be paid to the association on or before the last Saturday of each month. Shareholders are required to pay monthly installments without notice.

SEC. 15. In case of change of residence or post-office address, name of the shareholder or his or her legal representative, notice thereof in writing shall be given at once to the secretary of the association.

SEC. 16. All remittances for advance, installments, premiums, monthly installments, fines and penalties, interest and premiums, and all other payments, shall be made to the secretary of the association at the home office, and in registered letter, express or money order or drafts. Individual checks shall not be received.

SEC. 17. Should the board of directors require further evidence of a claim than is given in the proof furnished on the same, it hereby reserves the right to extend the time of payment until such necessary proof is furnished and investigation is made. The association shall have sixty days after the filing of the proofs of a claim, and the approval thereof by the board of directors, in which to pay the same, and this applies to claims maturing by death as well as to maturity of stock.

SEC. 18. If shares are withdrawn at any time before maturity, the holders thereof will be entitled to receive the amount paid into the loan fund in monthly payments; after six payments have been made on stock the holder thereof can withdraw his monthly installments that have been paid to the local fund, with interest at the rate of six per cent. per annum, seven per cent. after two years and eight per cent. after three years.

SEC. 19. Any shareholder wishing to withdraw his stock may be allowed to do so at any time, but the association shall not be required

to pay out more than one-half of the net receipts of the monthly installments paid in that month, to withdrawing members.

SEC. 20. The association reserves the right to mature any certificate at any time after one year, and to issue a paid-up certifi-
77 cate of shares, payable at maturity of stock, with interest at the rate of six per cent. per annum, or at maturity of stock in pledge, payable at time of maturity of loan. The association reserves the right to cancel any unpledged certificate, after it has been in force three years, upon the payment to the owner of the total amount of installments paid thereon, together with eight per cent. per annum as added dividend.

SEC. 21. And it is hereby expressly agreed between all shareholders and this association, that a payment of one hundred dollars per share, named in their certificate, that has been in force till maturity, shall be accepted as full payment of all claims on their certificate or against this association.

SEC. 22. Paid-up and non-assessable stock may be issued and sold at the price of fifty dollars per share payable on date of issue. Any parties holding such paid-up stock, wanting to withdraw the same before maturity, may do so and receive six per cent. annual interest from the date of issue of said stock.

SEC. 23. Paid-up stock shall be indorsed by the trustee and cannot be withdrawn for one year from date of issue.

Article XV.

Loans.

SECTION 1. Each shareholder, for each share named in their certificate, shall be entitled to a loan of one hundred dollars from the association, provided they shall first make application for such a loan upon a blank furnished by the association for that purpose, if the condition of the loan fund in the treasury shall warrant it. All applications for loans shall be filed and numbered consecutively as received, and be examined and approved, or rejected, by the board in their regular order.

SEC. 2. All shares must be in force three months before said shareholder shall be entitled to a loan. All applications for loans are part of the contract of the shareholders with this association. Nothing herein contained shall prevent the board of directors from loaning funds of the association to any member in greater sums than the above provided upon approved securities.

Article XVI.

Local boards.

SECTION 1. Whenever sufficient stock has been sold in any town to make it advisable the members residing in each town may
78 organize a local board or branch of the association. The officers of the local organization shall consist of a board of from five to nine directors, from whose number shall be elected a president, secretary and treasurer (combined) and attorney; all of

whom must be shareholders in the association; these officers shall hold office one year and until their successors are elected.

SEC. 2. The traveling agents of the association are given authority to appoint the first officers of the local board. Provided, however, that officers so appointed shall only hold office until the members of the local board meet and elect their successors.

SEC. 3. It shall be the duty of the officers of the local board to pass on all applications for loans which are received by the association from members residing in the town where such local board is located, and to protect the interest of the association in all practicable ways.

SEC. 4. Members may, if they so desire, make monthly payments on stock to the local treasurer. But such local treasurer shall be deemed to be the agent of the members, and not of the association.

SEC. 5. As soon as the officers of the local board have been appointed or elected, and the names of such officers have been certified to the association by a traveling agent or by the local secretary, a local-board charter shall be issued to such board.

SEC. 6. The president of the local board shall call a meeting thereof whenever three members shall request him so to do.

Article XVII.

By-laws.—Amendment.

SECTION 1. No amendment shall be made to these by-laws unless previously indorsed by resolution of the board of directors and adopted by a majority vote of the stock of said corporation.

The within-mentioned shares of stock in the Eastern Building and Loan Association of Syracuse, N. Y., are hereby withdrawn, and I have this day received the sum of forty-six hundred dollars in full of the amount due me by reason of such withdrawal.

Dated at Memphis, 7/16, 1891.

H. L. BEDFORD. [SEAL.]

Witness:

J. H. T. MARTIN.

Endorsed: Read your certificate of shares. No. 4773. Shares, 46. $4,600.00. Eastern Building and Loan Association of Syracuse, N. Y. Shareholders, H. L. Bedford; city or town, Bailey; county, Shelby; State, Tennessee; monthly installment, $34.50; date of issue, Feb'y 2, 1891; maturity, August 1, 1897. Always mention the number of this certificate when writing to the home office.

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"EXHIBIT D." A. P. Fowler, Notary Public.

Each question must be answered in this application for loan.

From the Eastern Building and Loan Association of Syracuse, N. Y.

— —— —— do hereby make application for a loan of forty-six hundred ($4,600.00) dollars, for six and a half years, to bear interest

at the rate of five per cent. per annum, and a premium of five per cent. per annum, payable on or before the last Saturday of each month; all payments to be paid at such place as the lender may direct: and to secure the same — agree to give a mortgage on the real estate set forth in the following questions and answers:

1. Name of applicant: H. L. Bedford.
2. Name of wife, if married? Lou M. Bedford.
3. What is your post-office, street and number? Bailey, Shelby Co., Tenn.
4. What is the population of the town? Village.
5. What is the population of the county? 120,000, about.
6. What is your occupation? Farmer.
7. What has your occupation been? Farmer.
8. The title to the property is in the name of? H. L. Bedford.
9. What is the description of the property offered as security? 400 acres farming, 260 acres in cultivation, 7-room wood and frame dwelling, barn, tenant-house, at Bailey, Tenn.

(Give size, number of lot, block, addition, town, county; also show the location of the same on diagram on the other side.)

10. What is the size of the ground? 400 acres.

80 11. On what street or streets is it situated and number? Farm.

12. Is the ground above or below grade, and how much? Undulating.
13. What is the distance from the business center of town? About 100 yards from depot.
14. Is there a continuous sidewalk from the property to business? No.
15. What buildings are on the premises, and how occupied? Dwelling, barn, stables, tenant houses, etc.
16. Kind of buildings now on premises? Frame, 1½ stories high, 7 rooms. Cistern? Yes. Soft-wood finish. Soft mantels. Size on ground. Is it all finished? Give size and description of cellar. Is the house painted?
17. When built and in what repair? Do not know exactly, but some years since.
18. What kind of flues in your house? Chimneys.
19. What direction does your house front? North.
20. Give date of last improvements, and what were they? Built one house this winter and fencing.
21. Have all the bills been paid for such repairs and erections? Yes.
22. Of what kind and in what repair are the fences and sidewalks? Good.
23. Have you a barn? Yes. Size, 40 x 60; value in cash, $200.00.
24. What improvements are there aside from the buildings, fence and sidewalk? Orchards, wells, cisterns and forest shade trees.

(State particulars about fruit, shade and ornamental trees.)

25. How long have you owned the property? Five years.

26. How much did you pay for it, and did you pay in cash or other property? $6,000.00; part cash; $1,200 in other property.

27. What amount of fire insurance will you carry in an approved company for benefit of lender? Not insured.

28. If the property is rented, state to whom, for what period and rental. Only part for $180.00. 1 farm balance.

29. What is the property worth in cash, exclusive of the buildings? $6,000.

30. What are the buildings worth in cash? $2,000.00.

31. Is the title perfect in applicant? Yes.

32. Is the property incumbered in any way by mortgage or mechanics' liens, unpaid taxes, judgments, suits pending, or liens of any kind? If so, state the nature, date, maturity and amount of incumbrances, and by whom held. No.

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33. Can the liens on the premises, if any, be paid now? There are none.

34. Kind of buildings to be built? Frame, brick, stone, brick veneer, stories, rooms, furnace, cisterns, well, city water, sewer, bathrooms, hard-wood finish, soft-wood finish, mantels, size of ground.

35. Value in cash of buildings to be built? None.

36. Annual rent of buildings in cash to be built? None.

37. Amount of insurance payable to mortgage on building to be built? $—.

The money to be paid upon this loan as follows:

38. When foundation is completed? $—.

39. When roof is on? $—.

40. When plastering is finished? $—.

41. When inside finish is placed? $—.

42. When all is completed, the balance? $—.

43. Is there anything within your knowledge not embraced in the foregoing that would render this loan unsafe? No.

44. For what is the money borrowed? For investment to relieve adjoining property.

45. Does your wife consent to join in the note or mortgage? Yes.

46. Have all the holders of liens consented in writing to release upon payment of amounts due? There are none.

47. What is the cash value of the property owned by you? $40,000.00 easy.

48. What are your total liabilities at this time? $5,000.00.

49. What could the property be sold for now in cash. $6,000.00 easy.

50. What would it bring in cash at forced sale now? $6,000.00, or $15 per acre.

If this application is accepted, I will furnish at my own expense a complete abstract of title to the land proposed as security, and have the same certified to be correct by the proper county officers, which shall be brought down to date subsequent to the filing of the instrument securing my loan, and show a clear and perfect title in the mortgagors. Also attorney's search and pay expenses of exam-

82 ination and appraisement of the property, and pay for recording the mortgage or trust deed, and I further agree to forward with said paper ten dollars ($10) to pay the attorney of the association for making the examination of the same. I also agree to furnish the mortgagee each year during the continuance of said loan with evidence that all taxes and other assessments against said property have been paid. I also agree to keep the property insured for $— in favor of the mortgagee. Dated at Memphis, this 20th day of March, 1891.

(Signed) H. L. BEDFORD. [SEAL.]

H. B. MARTIN, *Witness.*

— solemnly swear that the foregoing statements are true. That the owner of the above-described premises is an actual and peaceable possessor of the same, and — title and possession have never been questioned, and that there are no judgments against — in any courts of record in said county, or in the United States courts; and that — do not owe any money to mechanics or builders or others for work done or material furnished for improvements made on the above-described premises; and that there are no encumbrances on said property, except as stated above.

H. L. BEDFORD. [SEAL.]

STATE OF TENNESSEE, *Shelby County,* } ss:

On this 20th day of March, A. D. 1891, personally appeared before me, the above-named H. L. Bedford and made oath that the answers by him made and subscribed are true and full.

[SEAL.] H. B. MARTIN,
Notary Public, Shelby County.

Appraisers' Report.

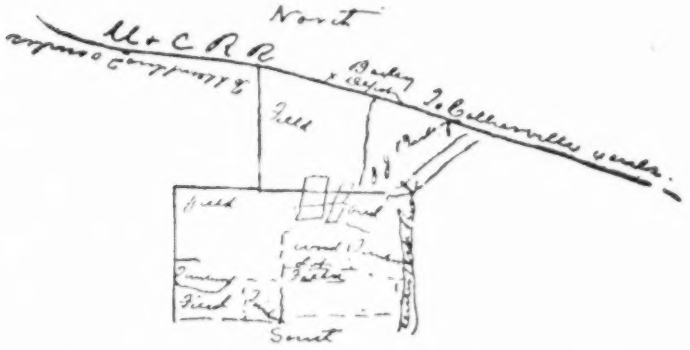
STATE OF TENNESSEE, *Shelby County,* } ss:

We, the undersigned, do solemnly swear that we are well acquainted with the value of town or city property in Shelby Co., and with the property described in above application, and that it is worth exclusive of the buildings, in cash $6,000, *dollars,* and the buildings are worth in cash $1,000, *dollars.* The property would bring at forced sale, in cash, at the present time, $6,000. We are personally acquainted with H. L. Bedford, mentioned in the within application, and believe him to have good standing
83 and credit. We regard him as a prompt, upright, reliable person, pecuniarily responsible for his contracts, and we believe that he will promptly meet all payments of principal and interest on the loan herein applied for. We are not interested in said premises, nor in the result of this application for a loan.

(Signed) GEO. E. RUDISELL. [SEAL.]
C. B. GALLOWAY. [SEAL.]
J. H. T. MARTIN.

Subscribed and sworn to before me, this 5 day of May, A. D. 1891.

[SEAL.] H. B. MARTIN,
Notary Public.



Endorsed: No. 165. Cert. No. 4773. $4,600. Application for a loan by H. L. Bedford. Town, Bailey. County, Shelby. State, Tennessee. Approved May 18, 1891.

EXHIBIT E. A. P. Fowler, Notary Public.

Application for an Advance.

To the board of directors of the Eastern Building and Loan Association of Syracuse, N. Y.

GENTLEMEN: At a regular meeting of your board, held May 18, 1891, having obtained the preference for an advance on forty-six shares of No. 4773 of your association, at a premium of ten per cent. I now respectfully request the advance be granted. I hereby
84 agree to comply with the charter and by-laws of your association and all requirements defined by your committee of the board of directors.

H. L. BEDFORD, *Applicant.*

Witness:
J. H. T. MARTIN.

STATE OF TENNESSEE, } ss:
Shelby County, }

H. L. Bedford, of Bailey, said Co., being duly sworn, doth depose and say that the lands and premises described in the mortgage executed by deponent and Lou M. Bedford, his wife to the Eastern Building and Loan Association of Syracuse, N. Y., under date of May 1st, 1891, and being on 400 acres conveyed to deponent by B. W. Lauderdale and wife, Feb'y 10, 1886, and situate in 10th civil district of said county, are owned by deponent in fee-simple and free and clear from all mortgages (except the mortgage aforesaid),

taxes, assessments, judgments, clouds, liens and encumbrances of every kind and description, whatever, including obligations for purchase-money of the same, and that the title of deponent to the same is perfect and indefeasible; that deponent is now and has been for five years last past in the quiet and undisputed possession of said premises, and that deponent and those under and through whom title is claimed, and has been derived, have actually and exclusively occupied the same under a claim of title for more than twenty years last past; that said mortgaged premises are the same premises referred to in the application for loan and appraised therefore by the appraising committee of said association at Memphis, Tenn., that no mortgage, lien or encumbrance of any kind has been executed, or suffered or permitted to be executed, by deponent upon said premises prior to the said aforesaid mortgage to said association within the last ninety days, and that said mortgage is the only encumbrance now in force and a lien upon said premises. And deponent further deposes and says that he is not on any person's bond as surety for the payment of any sum of money, or upon any official bond of any kind either as principal or surety, nor are there any judgments or decrees of any United States court outstanding against deponent or any former owner of said premises and a lien thereon; that deponent and Lou M. Bedford, his wife, are citizens of the United States and each of the age of twenty-one years and upwards; and that the statements and representations herein are made
85 for the purpose of procuring a loan from said association, for the security of which the aforesaid mortgage is given, and for no other purpose whatever.

H. L. BEDFORD.

Subscribed and sworn to before me this 20 day of June, 1891.
[SEAL.] J. H. T. MARTIN,
Notary Public.

"EXHIBIT F." A. P. Fowler, Notary Public.

Eastern Building and Loan Association of Syracuse, N. Y.

JULY 8, 1891.

Pay to H. L. Bedford, or order, forty-one hundred, forty $\frac{00}{100}$ dollars ($4,140.00) with exchange on New York.
[SEAL.] JNO. J. W. REYNOLDS, *Secretary.*

To Trust & Deposit Co. of Onondaga, Syracuse, N. Y.

No. 866.

Endorsed: H. L. Bedford.

Pay Mechanics' national bank, New York, N. Y., or order for account of Union & Planters' Bank of Memphis, Tenn.
No. 21075. S. P. READ, *Cashier.*

For collection, for acc't, of Mechanics' national bank, N. Y.
WM. SHARP, JR., *Cashier.*
(3d teller.)

Not valid unless countersigned by L. M. Kinne, treasurer.

86 "EXHIBIT G." A. P. Fowler, Notary Public.

MEMPHIS, TENN., *Aug.* 13, '90.

Minutes of a Meeting of the Stockholders, at Memphis, Aug. 13, '90, of the Eastern Building and Loan Association of Syracuse, N. Y.

Pursuant to a call of Mr. G. H. Hodge on Aug. 13, '90, there met at the office of Hodge & Palty, Memphis, Tennessee, the following stockholders of the Eastern Building & Loan Association:

J. W. Buchanan.
Thos. E. Edwards.
J. H. T. Martin.
G. F. Hulls.
G. H. Hodge.
T. J. Patty.
T. C. Lowrey.

Upon motion of Mr. Hodge, Judge Buchanan was elected to the chair and the meeting then called to order.

The first business before the meeting was the election of nine directors of this local board to serve for 12 months. The following names were declared elected: J. R. Pepper, Thos. Dean, J. W. Buchanan, Thos. E. Edwards, J. H. T. Martin, G. F. Hulls, G. H. Hodge, T. J. Patty, T. C. Lawry.

There being no further business before this meeting, Mr. Edwards motioned to adjourn which was carried. Minutes read and approved. J. H. Martin, acting secretary. Upon the adjournment of the meeting of the stockholders a meeting of the directors was immediately called. Upon motion Mr. Hodge was elected to the chair. Mr. Hulls nominated J. R. Pepper for president, which was promptly seconded, and Mr. Edwards was authorized to cast the vote for all present, for Mr. Pepper which he did. Mr. Dean was then nominated for vice-president, and Mr. Edwards authorized to cast all the votes for him, which he did and Mr. Pepper and Mr. Dean were declared elected.

The position of office of secretary and treasurer was then openly discussed and it was deemed best by the officers to combine the two officers in one. Mr. T. C. Lawry was nominated for the office, and Mr. Edwards authorized to cast the votes for seven directors present for Mr. Lawry which he did, and Mr. Lawry was declared
87 elected, his compensation to be fixed at a future meeting.

Judge Buchanan was then nominated for attorney for the company at Memphis, and Mr. Edwards likewise authorized to cast all seven votes which he did, and Judge Buchanan was declared the attorney for the company. There being no further business before the meeting Mr. Edwards moved to adjourn subject to call of the president which was carried.

Respectfully submitted.

J. H. MARTIN,
Acting Sec'y.

Application for Local Board Charter.

Eastern Building and Loan Association, home office, Syracuse, N. Y.:

We, the undersigned, hereby apply to the Eastern Building and Loan Association of Syracuse, N. Y., for a local board charter.

Is it the duty of local board to assist the association, in every way possible, in the transaction of its business. No loans will be made to members unless they are connected with and under the jurisdiction of a local board. Applications for loans will not be entertained at the home office unless first approved by the local board. The officers of a local board consist of a president (vice-president), secretary and treasurer (combined), and board of not less than five nor more than nine directors and an attorney, and each member to be a stockholder. Traveling agents may appoint the first officers of the board whose term shall immediately expire on the election of successors. The local board treasurer shall be deemed the agent of the local board members and not the agent of the association. Is it expected and desired that local boards send delegates from time to time to the home office.

Name.	P. O. address.	Occupation.
J. R. Pepper	Memphis	Merchant.
Wm. Dean	Memphis	Merchant.
Tom C. Lowrey	Memphis	Real-estate ag't.
G. H. Hulls	Memphis	U. S. St. boat insp't.
Thos. E. Edwards	Memphis	M. D.
J. H. Martin	Memphis	Real-estate dealer.
J. W. Buchanan	Memphis	Att'y-at-law.
G. H. Hodge	Memphis	Real-estate dealer.
F. J. Patty	Memphis	Real-estate dealer.

88 *Officers of Local Board.*

President, J. R. Pepper; secretary and treasurer, Tom C. Lowrey; vice-president, Wm. Dean; attorney, J. W. Buchanan.

I hereby certify that above is a correct list of officers elected by said board.

HODGE & PATTY, *Agents.*

"Exhibit H." A. P. Fowler, Notary Public.

Extract of the minutes of a regular adjourned meeting of the officers and directors of the Eastern Building & Loan Association, held at its offices in the Kirk block, Syracuse, N. Y., May 18th, 1891.

"The loan committee reported and recommended that loans be granted as follows: * * * App. No. 165, on certificate 4776, of H. L. Bedford, Bailey, Tennessee, for $4,600.00. On motion report of committee was adopted.

W. H. EMERY,
Ass't Sec'y."

Circuit Court of the United States, Western District of Tennessee.

EASTERN BUILDING & LOAN ASSOCIATION, ETC., vs. H. L. BEDFORD and WIFE. } No. 487.

STATE OF NEW YORK, *Northern District, County of Onondaga,* } ss:

I hereby certify that on the 17th day of February, 1896, before me, Albert P. Fowler, a notary public in and for the county of Onondaga and State of New York, at my office No. 626 Kirk block, in the city of Syracuse, county of Onondaga, and State of New York, personally appeared, pursuant to the annexed agreement, D. A. Pierce, Esq., the witness named in said agreement. No one appearing as counsel for either said plaintiff or said defendants, and the said D. A. Pierce being by me first duly cautioned
89 and sworn to testify the whole truth, and being carefully examined, deposed and said as appears by the deposition hereto annexed; and I further certify that said deposition was then and there reduced to writing by me, and was, after it had been reduced to writing, subscribed by the witness, and the same being retained by me for the purpose of sealing up and directing the same to the clerk of the court as required by law; and I further certify that the reason why said deposition was taken, was that the said witness resides at the city of Syracuse, N. Y., more than one hundred miles from Memphis, Tennessee, the place where the cause is to be tried; and I further certify that I am not of counsel or attorney to either of the parties, nor am I interested in the event of the cause; and I further certify that the fee for taking said deposition, ten dollars ($10) has been paid to me by the plaintiff and the same is just and reasonable.

In testimony whereof, I have hereunto set my hand and official seal at the city of Syracuse, county of Onondaga and State of New York, this 17th day of February, A. D. 1896.

[SEAL.] ALBERT P. FOWLER,
Notary Public.

Circuit Court of the United States, Western District of Tennessee.

EASTERN BUILDING & LOAN ASSOC'N vs. H. L. BEDFORD and WIFE. } No. 487.

Notes. Filed April 8, 1896.

No. 9698.—On or before the last Saturday of June, 1893, I promise to pay seventy-two and 86-100 dollars, $72 86-100, to the order of the Eastern Building and Loan Association at its office in Syracuse, N. Y. Value received. Bailey, Tenn., May 1st, 1891. H. L. Bedford.

No. 9699.—On or before the last Saturday of July, 1893, I promise to pay seventy-two and 86-100 dollars, $72 86-100, to the

order of the Eastern Building and Loan Association at its office in Syracuse, N. Y. Value received. Bailey, Tenn., May 1st, 1891. H. L. Bedford.

90 No. 9700.—On or before the last Saturday of August, 1893, I promise to pay seventy-two and 86-100 dollars, $72 86-100, to the order of the Eastern Building and Loan Association at its office in Syracuse, N. Y. Value received. Bailey, Tenn., May 1st, 1891. H. L. Bedford.

No. 9701.—On or before the last Saturday of September, 1893, I promise to pay seventy-two and 86-100 dollars, $72 86-100, to the order of the Eastern Building and Loan Association at its office in Syracuse, N. Y. Value received. Bailey, Tenn., May 1st, 1891. H. L. Bedford.

No. 9702.—On or before the last Saturday of October, 1893, I promise to pay seventy-two and 86-100 dollars, $72 86-100, to the order of the Eastern Building and Loan Association at its office in Syracuse, N. Y. Value received. Bailey, Tenn., May 1st, 1891. H. L. Bedford.

No. 9703.—On or before the last Saturday of November, 1893, I promise to pay seventy-two and 86-100 dollars, $72 86-100, to the order of the Eastern Building and Loan Association at its office in Syracuse, N. Y. Value received. Bailey, Tenn, May 1st, 1891. H. L. Bedford.

No. 9704.—On or before the last Saturday of December, 1893, I promise to pay seventy-two and 86-100 dollars, $72 86-100, to the order of the Eastern Building and Loan Association at its office in Syracuse, N. Y. Value received. Bailey, Tenn., May 1st, 1891. H. L. Bedford.

No. 9705.—On or before the last Saturday of January, 1894, I promise to pay seventy-two and 86-100 dollars, $72 86-100, to the order of the Eastern Building and Loan Association at its office in Syracuse, N. Y. Value received. Bailey, Tenn., May 1st, 1891. H. L. Bedford.

No. 9706.—On or before the last Saturday of February, 1894, I promise to pay seventy-two and 86-100 dollars, $72 86-100, to the order of the Eastern Building and Loan Association at its office in Syracuse, N. Y. Value received. Bailey, Tenn., May 1st, 1891. H. L. Bedford.

No. 9707.—On or before the last Saturday of March, 1894, I promise to pay seventy-two & 86-100 dollars, $72 86-100, to the order of the Eastern Building and Loan Association, at its office, in Syracuse, N. Y. Value received. Bailey, Tenn, May 1st, 1891. H. L. Bedford.

91 No. 9708.—On or before the last Saturday of April, 1894, I promise to pay seventy-two & 86-100 dollars, $72 86-100, to the order of the Eastern Building and Loan Association, at its office, in Syracuse, N. Y. Value received. Bailey, Tenn., May 1st, 1891. H. L. Bedford.

No. 9709.—On or before the last Saturday of May, 1894, I promise to pay seventy-two & 86-100 dollars, $72 86-100, to the order of the Eastern Building and Loan Association, at its office, in Syracuse,

N. Y. Value received. Bailey, Tenn., May 1st, 1891. H. L. Bedford.

No. 9710.—On or before the last Saturday of June, 1894, I promise to pay seventy-two & 86-100 dollars $72 86 100, to the order of the Eastern Building and Loan Association, at its office, in Syracuse, N. Y. Value received. Bailey, Tenn., May 1st, 1891. H. L. Bedford.

No. 9711.—On or before the last Saturday of July, 1894, I promise to pay seventy-two & 86-100 dollars $72 86-100, to the order of the Eastern Building and Loan Association, at its office, in Syracuse, N. Y. Value received. Bailey, Tenn., May 1st, 1891. H. L. Bedford.

No. 9712.—On or before the last Saturday of August, 1894, I promise to pay seventy-two & 86-100 dollars, $72 86-100, to the order of the Eastern Building and Loan Association, at its office, in Syracuse, N. Y. Value received. Bailey, Tenn., May 1st, 1891. H. L. Bedford.

No. 9713.—On or before the last Saturday of September, 1894, I promise to pay seventy-two & 86-100 dollars, $72 86-100, to the order of the Eastern Building and Loan Association, at its office, in Syracuse, N. Y. Value received. Bailey, Tenn., May 1st, 1891. H. L. Bedford.

No. 9714.—On or before the last Saturday of October, 1894, I promise to pay seventy-two & 86-100 dollars, $72 86-100, to the order of the Eastern Building and Loan Association, at its office, in Syracuse, N. Y. Value received. Bailey, Tenn., May 1st, 1891. H. L. Bedford.

No. 9715.—On or before the last Saturday of November, 1894, I promise to pay seventy-two & 86-100 dollars, $72 86-100, to the order of the Eastern Building and Loan Association, at its office, in Syracuse, N. Y. Value received. Bailey, Tenn., May 1st, 1891. H. L. Bedford.

92 No. 9716.—On or before the last Saturday of December, 1894, I promise to pay seventy-two & 86-100 dollars, $72 86-100, to the order of the Eastern Building and Loan Association, at its office, in Syracuse, N. Y. Value received. Bailey, Tenn. May 1st, 1891. H. L. Bedford.

No. 9717.—On or before the last Saturday of January, 1895, I promise to pay seventy-two & 86-100 dollars, $72 86-100, to the order of the Eastern Building and Loan Association, at its office, in Syracuse, N. Y. Value received. Bailey, Tenn., May 1st, 1891. H. L. Bedford.

No. 9718.—On or before the last Saturday of February, 1895, I promise to pay seventy-two & 86-100 dollars, $72 86-100, to the order of the Eastern Building and Loan Association, at its office, in Syracuse, N. Y. Value received. Bailey, Tenn., May 1st, 1891. H. L. Bedford.

No. 9719.—On or before the last Saturday of March, 1895, I promise to pay seventy-two & 86-100 dollars, $72 86-100, to the order of the Eastern Building and Loan Association, at its office, in Syracuse,

N. Y. Value received. Bailey, Tenn., May 1st, 1891. H. L. Bedford.

No. 9720.—On or before the last Saturday of April, 1895, I promise to pay seventy-two & 86-100 dollars, $72 86-100, to the order of the Eastern Building and Loan Association, at its office, in Syracuse, N. Y. Value received. Bailey, Tenn., May 1st, 1891. H. L. Bedford.

No. 9721.—On or before the last Saturday of May, 1895, I promise to pay seventy-two & 86-100 dollars, $72 86-100, to the order of the Eastern Building and Loan Association, at its office, in Syracuse, N. Y. Value received. Bailey, Tenn., May 1st, 1891. H. L. Bedford.

No. 9722.—On or before the last Saturday of June, 1895, I promise to pay seventy-two & 86-100 dollars, $72 86-100, to the order of the Eastern Building and Loan Association, at its office, in Syracuse, N. Y. Value received. Bailey, Tenn., May 1st, 1891. H. L. Bedford.

No. 9723.—On or before the last Saturday of July, 1895, I promise to pay seventy-two & 86-100 dollars, $72 86-100, to the order of the Eastern Building and Loan Association, at its office, in Syracuse, N. Y. Value received. Bailey, Tenn., May 1st, 1891. H. L. Bedford.

93 No. 9724.—On or before the last Saturday of August, 1895, I promise to pay seventy-two & 86-100 dollars, $72 86-100, to the order of the Eastern Building and Loan Association, at its office, in Syracuse, N. Y. Value received. Bailey, Tenn., May 1st, 1891. H. L. Bedford.

No. 9725.—On or before the last Saturday of September, 1895, I promise to pay seventy-two & 86-100 dollars, $72 86-100, to the order of the Eastern Building and Loan Association, at its office, in Syracuse, N. Y. Value received. Bailey, Tenn., May 1st, 1891. H. L. Bedford.

No. 9726.—On or before the last Saturday of October, 1895, I promise to pay seventy-two & 86-100 dollars, $72 86-100, to the order of the Eastern Building and Loan Association, at its office, in Syracuse, N. Y. Value received. Bailey, Tenn., May 1st, 1891. H. L. Bedford.

No. 9727.—On or before the last Saturday of November, 1895, I promise to pay seventy-two & 86-100 dollars, $72 86-100, to the order of the Eastern Building and Loan Association, at its office, in Syracuse, N. Y. Value received. Bailey, Tenn., May 1st, 1891. H. L. Bedford.

No. 9728.—On or before the last Saturday of December, 1895, I promise to pay seventy-two & 86 100 dollars, $72 86-100, to the order of the Eastern Building and Loan Association, at its office, in Syracuse, N. Y. Value received. Bailey, Tenn., May 1st, 1891. H. L. Bedford.

No. 9729.—On or before the last Saturday of January, 1896, I promise to pay seventy-two & 86-100 dollars, $72 86-100, to the order of the Eastern Building and Loan Association, at its office, in

Syracuse, N. Y. Value received. Bailey, Tenn., May 1st, 1891. H. L. Bedford.

No. 9730.—On or before the last Saturday of February, 1896, I promise to pay seventy-two & 86-100 dollars, $72 86-100, to the order of the Eastern Building and Loan Association, at its office, in Syracuse, N. Y. Value received. Bailey, Tenn., May 1st, 1891. H. L. Bedford.

No. 9731.—On or before the last Saturday of March, 1896, I promise to pay seventy-two & 86-100 dollars, $72 86-100, to the order of the Eastern Building and Loan Association, at its office, in Syracuse, N. Y. Value received. Bailey, Tenn., May 1st, 1891. H. L. Bedford.

94 No. 9732.—On or before the last Saturday of April, 1896, I promise to pay seventy-two and 86-100 dollars, $72 86-100, to the order of the Eastern Building and Loan Association, at its office, in Syracuse, N. Y. Value received. Bailey, Tenn., May 1st, 1891. H. L. Bedford.

No. 9733.—On or before the last Saturday in May, 1896, I promise to pay seventy-two and 86-100 dollars, $72 86-100, to the order of the Eastern Building and Loan Association, at its office, in Syracuse, N. Y. Value received. Bailey, Tenn., May 1st, 1891. H. L. Bedford.

No. 9734.—On or before the last Saturday of June, 1896, I promise to pay seventy-two and 86-100 dollars, $72 86-100, to the order of the Eastern Building and Loan Association, at its office, in Syracuse, N. Y. Value received. Bailey, Tenn., May 1st, 1891. H. L. Bedford.

No. 9735.—On or before the last Saturday of July, 1896, I promise to pay seventy-two and 86-100 dollars, $72 86-100, to the order of the Eastern Building and Loan Association, at its office, in Syracuse, N. Y. Value received. Bailey, Tenn., May 1st, 1891. H. L. Bedford.

No. 9736.—On or before the last Saturday of August, 1896, I promise to pay seventy-two and 86-100 dollars, $72 86-100, to the order of the Eastern Building and Loan Association, at its office, in Syracuse, N. Y. Value received. Bailey, Tenn., May 1st, 1891. H. L. Bedford.

No. 9737.—On or before the last Saturday of September, 1896, I promise to pay seventy-two and 86-100 dollars, $72 86-100, to the order of the Eastern Building and Loan Association, at its office, in Syracuse, N. Y. Value received. Bailey, Tenn., May 1st, 1891. H. L. Bedford.

No. 9738.—On or before the last Saturday of October, 1896, I promise to pay seventy-two and 86-100 dollars, $72 86-100, to the order of the Eastern Building and Loan Association, at its office, in Syracuse, N. Y. Value received. Bailey, Tenn., May 1st, 1891. H. L. Bedford.

No. 9739.—On or before the last Saturday of November, 1896, I promise to pay seventy-two and 86-100 dollars, $72 86-100, to the order of the Eastern Building and Loan Association, at its office, in

Syracuse, N. Y. Value received. Bailey, Tenn., May 1st, 1891. H. L. Bedford.

95 No. 9740.—On or before the last Saturday of December, 1896, I promise to pay seventy-two and 86-100 dollars, $72 86-100, to the order of the Eastern Building and Loan Association at its office in Syracuse, N. Y. Value received. Bailey, Tenn., May 1st, 1891. H. L. Bedford.

No. 9741.—On or before the last Saturday of January, 1897, I promise to pay seventy-two and 86-100 dollars, $72 86-100, to the order of the Eastern Building and Loan Association at its office in Syracuse, N. Y. Value received. Bailey, Tenn., May 1st, 1891. H. L. Bedford.

No. 9742.—On or before the last Saturday of February, 1897, I promise to pay seventy-two and 86-100 dollars, $72 86-100, to the order of the Eastern Building and Loan Association at its office in Syracuse, N. Y. Value received. Bailey, Tenn., May 1st, 1891. H. L. Bedford.

No. 9743.—On or before the last Saturday of March, 1897, I promise to pay seventy-two and 86-100 dollars, $72 86-100, to the order of the Eastern Building and Loan Association at its office in Syracuse, N. Y. Value received. Bailey, Tenn., May 1st, 1891. H. L. Bedford.

No. 9744.—On or before the last Saturday of April, 1897, I promise to pay seventy-two and 86-100 dollars, $72 86-100, to the order of the Eastern Building and Loan Association at its office in Syracuse, N. Y. Value received. Bailey, Tenn., May 1st, 1891. H. L. Bedford.

No. 9745.—On or before the last Saturday of May, 1897, I promise to pay seventy-two and 86-100 dollars, $72 86-100, to the order of the Eastern Building and Loan Association at its office in Syracuse, N. Y. Value received. Bailey, Tenn., May 1st, 1891. H. L. Bedford.

No. 9746.—On or before the last Saturday of June, 1897, I promise to pay seventy-two and 86-100 dollars, $72 86-100, to the order of the Eastern Building and Loan Association at its office in Syracuse, N. Y. Value received. Bailey, Tenn., May 1st, 1891. H. L. Bedford.

No. 9747.—On or before the last Saturday of July, 1897, I promise to pay seventy-two and 86-100 dollars, $72 86-100, to the order of the Eastern Building and Loan Association at its office in Syracuse, N. Y. Value received. Bailey, Tenn., May 1st, 1891. H. L. Bedford.

96 No. 9748.—On or before the last Saturday of August, 1897, I promise to pay thirty-eight and 36-100 dollars, $38 36-100, to the order of the Eastern Building and Loan Association at its office in Syracuse, N. Y. Value received. Bailey, Tenn., May 1st, 1891. H. L. Bedford.

No. 9749.—On or before the last Saturday of September, 1897, I promise to pay thirty-eight and 36-100 dollars, $38 36-100, to the order of the Eastern Building and Loan Association at its office in

Syracuse, N. Y. Value received. Bailey, Tenn., May 1st, 1891. H. L. Bedford.

No. 9750.—On or before the last Saturday of October, 1897, I promise to pay thirty-eight and 36-100 dollars, $38 36-100, to the order of the Eastern Building and Loan Association at its office in Syracuse, N. Y. Value received. Bailey, Tenn., May 1st, 1891. H. L. Bedford.

UNITED STATES OF AMERICA,
Western Division of the Western District of Tennessee.

In the Circuit Court of the United States within and for the Western Division of the Western District of Tennessee, in the Sixth Judicial Circuit thereof.

Proceedings had in said court at a regular term thereof, begun and held for its November term, A. D 1895, at the United States court-house, in the city of Memphis, in said district, on, to wit, the 7 day of May, A. D. 1896, in the following cause, to wit:

EASTERN BUILDING & LOAN ASSOC'N, Plaintiff,
vs.
L. L. BEDFORD, LOU M. BEDFORD, Defendant-. } No. 487.

For satisfactory reasons to the court appearing, it is hereby ordered and decreed by the court that the foregoing cause in equity be and it is hereby continued for orders to the next term of this court.

No. 487. Circuit court of the United States, western district of Tennessee. E. B. & L. Association *vs.* H. L. Bedford *et al.* Order of court. Entered and filed 7 day of May, A. D. 1896. John B. Clough, clerk.

97 Circuit Court of the United States, Western District of Tennessee.

EASTERN BUILDING & LOAN ASSOCIATION
vs.
H. L. BEDFORD and WIFE. } No. 487.

Deposition of W. H. Emery. Filed Oct. 17th, 1896.

The deposition of W. H. Emery, a witness for complainant in the above-styled cause, taken on interrogatories, to be read at the trial of said cause.

Notice and all formalities waived and the right to except to said deposition for matters of incompetency and irrelevancy is, by agreement of counsel, alone reserved.

BUCHANAN & MINOR.

Q. 1. State your name, residence and present occupation. If you are connected in any way with the complainant association, in what capacity are you connected with it?

Circuit Court of the United States, Western District of Tennessee.

EASTERN BUILDING & LOAN ASSOCIATION
vs.
H. L. BEDFORD and WIFE. } No. 487.

STATE OF NEW YORK, *Northern District, County of Onondaga,* } *ss:*

W. H. EMERY, the witness called on behalf of the plaintiff herein, and residing at the city of Syracuse, N. Y., more than one hundred miles from the place where this cause is to be tried, being duly cautioned and sworn to tell the whole truth, and being carefully examined, deposes and says as follows:

1. To the first interrogatory he says: My name is W. H. Emery; I reside at No. 312 Merriman avenue, in the city of Syracuse, N. Y., and am assistant secretary of The Eastern B. & L. Association, the complainant association.

Q. 2. Please refer to the account of H. L. Bedford, which is
98 attached to the original bill in this cause as Exhibit C, and which is sworn to. Explain the various items composing said account and state what each is for.

2. To the second interrogatory he says: Exhibit "C" is a statement showing the balance owing by H. L. Bedford to the complainant association on the 29th of April, 1895, on a loan or advance of $4,600.00, the same being the maturity value of forty-six shares of stock held by him in the complainant association and represented by certificate No. 4773, said advance or loan being made under date of May 1, 1891, and known as loan No. 125. On the debit side the first item, to wit, $4,600.00 represents the amount of the advance or loan. The next item of $1,675.09 is the amount of monthly payments of dues on said shares and interest (5 per cent.) and premium (5 per cent.) defaulted and in arrears at the date of said statement, the same being represented by notes of said Bedford secured by his mortgage, amounting to $72.83 each, the first defaulted note falling due on the last Saturday of June, 1895, and one each succeeding month up to and including the last Saturday of April, 1895, each of said notes of $72.83 includes the monthly dues payable on said certificate of shares on the last Staturday of each month, the monthly dues amounting to $34.50, and the balance of each of said notes being the monthly interest and premium on said loan at the rate of five per cent. per annum respectively. The item of $211.60 is the amount of fines imposed by the charter and by-laws of the complainant association on account of default in the payment of the twenty-three notes past due and unpaid on the 29th day of April, 1895, as already stated. Shares advanced or loaned upon are termed pledged shares, and borrowing members in case of default are required to pay a fine for each monthly default at the rate of 20 cents per share on each $100.00 loaned, and in this case therefore the fine for defauilting on any monthly payment is the sum of $9.20. $6,486.69 represents the total indebtedness with which Bed-

ford was chargeable at the date of the statement, April 29, 1895. On the contra side of the statement Bedford is credited with $966.00. This represents the total amount of dues actually paid by him on the aforesaid forty-six shares of stock. As I have already stated, the monthly dues payable on these shares amount to $34.50. As this certificate of shares was a February, 1891, issue, and payments were made down to and including May, 1893, twenty-eight monthly payments of dues were actually made, or in all the sum of $966.00. $73.15 represents the dividend to which said shares were under the by-laws entitled to in case of withdrawal after the payment of dues for May, 1893, had been made and
99 prior to default on the June, 1893, payment, the same being at the rate of seven per cent. per annum on $966.00 for the average time that said money was in the possession of the complainant association, to wit, thirteen months. $793.50 represents the aforesaid monthly dues embraced in the monthly notes of Bedford and included and charged against him in this statement, Exhibit "C" in the item of $1,675.09. The $214.35 represents the dividends to which said dues amounting to $793.50, if actually paid, would be entitled to in the event of withdrawal at the time said statement was made together with an additional dividend to which the aforesaid sum of 966.00 would be entitled since the first of June, 1893, computed at the rate of eight per cent. per annum for the average time. It will be observed that the total of $966.00, $73.15, $793.50, and $214.35 is the sum of $2,047.00; and this sum represents the withdrawal value, that is the dues and dividends on forty-six shares of stock issued in February, 1891, and assumed to have been paid on down to and including the month of April, 1895, and then withdrawn on the date of statement, to wit, April 29th, 1895, dividends being computed on the total of said dues at the rate of eight per cent. per annum for the average time, or twenty-four and one-half months. In addition to the running premium of five per cent. heretofore mentioned by me, Bedford bid what is termed a gross premium of ten per cent. for the privilege of obtaining the preference for an advance of his said shares, which said gross premium amounted to $460. The shares in question were estimated to mature in seventy-eight months, and it has been the practice of this association to treat said gross premium as being paid on the theory that the loan would run that length of time, and that $\frac{1}{78}$ of said premium is earned each month from the date of the issuance of the shares; as at the time this statement, Exhibit "C," was made, the certificate of shares was fifty-one months old, there remained twenty-seven months to run, and therefore $\frac{27}{78}$ of the gross premium of $460.00 was unearned, amounting to the sum of $159.22. There is an error in the computation of the monthly interest and premium of three cents too much, and therefore the notes — were given on this loan should have been for $72.83 instead of $72.86. Twenty-five notes of $82.86 each were actually paid by Bedford, and as there was an overpayment of three cents in each case, the total overpayment amounted to 75 cents, for which credit is given in

said statement, Exhibit "C." As the total items of debit
100 amount to $6,486 69 and the total credits to $2,206.97 the balance owing at the date of the statement, Exhibit "C," was the sum of $4,279.72.

Q. 3. If you know of any other facts which would be material to the rights of the parties to this cause, will you state them as your answer to this interrogatory?

Cross-examination waived for present, but right to cross-examine in future is reserved.

FRAZER & HEATH,
For Defendants.

3. To the third interrogatory he says: A member who has defaulted in the payment of his monthly dues is not in good standing, and is not under the by-laws entitled to withdraw his shares; however, in this case credit has been given not only for all dues on the shares actually paid, but credit has also been given for the earning to which they would be entitled if in good standing, as the loss of the use of the same if regularly paid, has in a measure been made up from the fines charged for the non-payment.

W. H. EMERY.

Subscribed and sworn to before me this 13th day of October, A. D. 1896.

[SEAL.] ALBERT P. FOWLER,
Notary Public.

Circuit Court of the United States, Western District of Tennessee.

EASTERN B. & L. ASSOCIATION
vs.
H. L. BEDFORD and WIFE. } No. 487. In Equity.

STATE OF NEW YORK,
Northern District, County of Onondaga, } *ss.:*

I hereby certify that on the 13th day of October, 1896, before me, Albert P. Fowler, a notary public, in and for the county of Onondaga and State of New York, at my office, No. 626 Kirk block, in the city of Syracuse, county of Onondaga and State of New York, personally appeared, pursuant to the annexed agreement, W. H. Emery, Esq., the witness named therein. No appearance as counsel for either said plaintiff or said defendant, and the said W. H.
101 Emery being by me first duly cautioned and sworn to testify the whole truth, and being carefully examined, deposed and said as appears by the deposition hereto annexed. And I further certify that said deposition was then and there reduced to writing by me, and was, after it had been reduced to writing, subscribed by the witness, and the same being retained by me for the purpose of sealing and directing the same to the clerk of the court as required by law. And I further certify that the reason why said deposition

was taken was that the said witness resides at the city of Syracuse, N. Y., more than one hundred miles from Memphis, Tennessee, the place where this cause is to be tried. And I further certify that I am not of counsel or attorney to either of the parties, nor am I interested in the event of the cause. And I further certify that the fee for taking said deposition, $5.00, has been paid to me by the plaintiff, and the same is just and reasonable.

In testimony whereof I have hereunto set my hand and official seal at the city of Syracuse, in the county of Onondaga and State of New York, this 13th day of October, A. D. 1896.

ALBERT P. FOWLER,
Notary Public.

[SEAL.]

Circuit Court of the United States, Western District of Tennessee.

THE EASTERN BUILDING & LOAN ASSOCIATION OF SYRACUSE, New York,
vs.
H. L. BEDFORD ET AL. } No. 487.

Deposition of H. L. Bedford. Filed Oct. 23, 1896.

Deposition of H. L. Bedford taken on behalf of defendants in the above cause.

Int. 1. State your name, age, and present residence and how long you have so resided.

Answer to 1st interrogatory. H. L. Bedford; aged, 60 years. I reside now in Shelby county, Tennessee, and have so resided for about (40) forty years.

Int. 2. Are you the defendant in this cause? Are you acquainted with the Eastern Building & Loan Association of Syracuse,
102 New York, and if so, how did you become acquainted with it? Was it directly or by intercourse with said association through its agents? If through such agents, where was such agency and who were the agents?

Answer to 2d interrogatory. I am the defendant in this case. I am acquainted with the Eastern Building & Loan Association of Syracuse, New York. I became acquainted with it through its agents in Shelby county, Tennessee. I became so acquainted through its said agents The said agents were H. B. Martin and J. H. T. Martin and the agency was in Shelby county, Tennessee, where H. B. Martin and J. H. T. Martin lived.

Int. 3. I call your attention to the following papers referred to in this case and made exhibits to the deposition of D. A. Pierce herein, viz:

(1.) An application for shares in the Eastern Building & Loan Association of Syracuse, New York, the same being for 46 shares therein. The said application is Exhibit B to Pierce's deposition. The same is dated Jan'y 23, 1891, and is signed "H. L. Bedford," and witnessed by H. B. Martin and said paper says on its face "Agent J. H. T. Martin."

(2.) Application for loan from the Eastern Building & Loan Association of Syracuse, N. Y., Exhibit D, to Pierce's deposition. This application is dated March 20, 1891, and is signed, H. L. Bedford and witnessed by H. B. Martin and the same was sworn to by H. L. Bedford, March 20, 1891, before H. B. Martin, notary public. On this same paper is an "appraisers' report" signed by Geo. E. Rudisell, C. B. Galloway and J. H. T. Martin, who swore to the same May 5, 1891, before H. B. Martin, notary public. This application is endorsed on the back "Approved, May 18, 1891."

(3.) "Application for an advance" Exhibit E to Pierce's deposition directed "to the board of directors of the Eastern Building & Loan Association of Syracuse, N. Y." This application is signed H. L. Bedford and is witnessed by J. H. Martin. It says "At a regular meeting of your board held May 18, 1891, having obtained the preference for an advance on 46 shares of No. 4773 of your association at a premium of ten per cent. I now respectfully request the advance be granted. I hereby agree to comply with the charter and by-laws of your association and all requirements defined by your committee of the board of directors." Pasted to this application is an affidavit of H. L. Bedford made before J. H. T. Martin, June 20th, 1891.

(4.) Draft of Eastern Building & Loan Association of
103 Syracuse, New York, in favor of H. L. Bedford, No. 4140, on Trust & Deposit Co., of Onondaga, Syracuse, N. Y. Endorsed: H. L. Bedford.

(5.) Mortgage of H. L. Bedford and Lou M. Bedford to Eastern Building & Loan Association of Syracuse, N. Y., dated May 1, 1891, acknowledged by those parties June 18, 1891, and filed for registration June 20, 1891.

(6.) Certificate for 46 shares of stock $4,600, No. 4773, in Eastern B. & L. Association of Syracuse, N. Y., dated Feb'y 2d, 1891.

The following appears on the back of said certificate, viz: "The within-mentioned shares of stock in the Eastern Building & Loan Association of Syracuse, N. Y., are hereby withdrawn and I have this day received the sum of forty-six hundred dollars in full the amount due me by reason of such withdrawal.

"Dated at Memphis, 7, 16, 1891.

"H. L. BEDFORD."

Witness:
J. H. T. MARTIN.

Please state whether you signed the various papers and made affidavits above referred to. The application for shares of date January 23, 1891; the application for loan dated March 20, 1891, and the affidavit attached thereto of March 20, 1891, and the appraisers' report. Sworn to May 5, 1891, by them, the application for advance and the affidavit pasted thereto of June 20, 1891. All appear to be on printed forms which were filled up—who had these forms before and at the time they were filled up? Were those and similar forms held by any persons as agents of the Eastern Building & Loan Association of Syracuse, N. Y., and if so whom and for

what purpose were they held and who had them filled up as they now appear to be?

Answer to 3d interrogatory. I signed the various papers and made the affidavits, H. B. Martin and J. H. T. Martin were in the same office. They had the forms before they were filled up, and at the time they were filled up. They had these and similar forms as the representatives of the Eastern Building & Loan Association of Syracuse, New York, for the purpose of getting up business. I suppose this was so as to the business of others but know it was so, so far as I am individually concerned about my business transactions with them. The Martins had the papers filled up. I did not—Exhibit B, the application for shares was filled up by H. B. Martin, the application for loans was filled up by H. B. Martin, the affidavit of June 20, 1891, was filled up by J. H. T. Martin.

104 The papers I executed were executed in Shelby county, Tenn.

Int. 4. Where were all the papers hereinbefore referred to executed? In what county and State? After they were executed by you what did you do with the various papers signed by you and to which your attention has been called? Did you send them yourself to the Eastern B. & L. Ass'n or return them to any persons as agent of the Eastern B. & L. Ass'n, and if so what persons? Were your transactions and intercourse with the Eastern B. & L. Ass'n of Syracuse carried on directly with, of or through its agents? If through agents, who were they and at what place?

Answer to 4th interrogatory. The papers were executed in Shelby county, Tennessee, that were signed by me. After I executed the papers, I returned to the Martins as agents of the Eastern Building & Loan Association of Syracuse, N. Y. I mean H. B. Martin and J. H. T. Martin. I did not send the papers myself to the association. My intercourse and transactions with the Eastern Building & Loan Association of Syracuse, New York, were carried on with it through its agents, H. B. Martin and J. H. T. Martin, in Shelby county, Tennessee.

Int. 5. What connection, if any, had H. B. Martin and J. H. T. Martin, whose names appear on some of the papers referred to, with the Eastern Building & Loan Association of Syracuse, N. Y.? Were they agents for it or not at the time you applied for shares or membership therein and before and after that time?

Answer to 5th interrogatory. I can safely say H. B. Martin and J. H. T. Martin were the agents of the Eastern B. & L. Association of Syracuse, New York, at, before and after I applied for shares, or membership, and had the transactions in question. The company recognized them as agents and ratified what they did, and they were represented to me as agents of that association.

Int. 6. How was the Eastern B. & L. Association of Syracuse, N. Y., represented in Shelby county, Tennessee, when you first applied for shares therein and before and after that time, and was it or not carrying on business in Tennessee at those dates?

Answer to 6th interrogatory. That association at the times mentioned was represented in Shelby county, Tennessee, by its agents,

H. B. Martin and J. H. T. Martin, and was also by a local board in Shelby county, Tennessee, composed of different people in that county and State. The Eastern Building & Loan Association of Syracuse, New York, was carrying on business in Shelby county, Tennessee, at the times I had the transactions.

105 Int. 7th. Did you have the various transactions you had with the Eastern Building & L. Ass'n of Syracuse, N. Y., in consequence of or in connection with its carrying on business in Tennessee, at those times or not? Was it carrying on business then?

Answer to 7th interrogatory. I had the various transactions with the Eastern Building & Loan Association of Syracuse, N. Y., in consequence of and in connection with its carrying on business in Tennessee at those times. It was so carrying on business.

Int. 8th. Did you ever make any bid as against anybody else for the amount which the Eastern Building & Loan Association of Syracuse, N. Y., loaned you, or was there simply a fixed premium of ten per cent. deducted when the loan was made?

Answer to 8th interrogatory. I did not make any bid as against anybody else. There was a deduction of ten per cent. as the papers show.

Int. 9th. The mortgage executed by you of date May 1, 1891, recites payment by the Eastern B. & L. Ass'n of $4,600 and said mortgage says it is to secure $5,683.08, evidenced by 78 notes given by you. The paper signed by you at Memphis, "7, 16, 1891," being July 16, 1891, and being on the certificate for shares acknowledges a receipt by you of $4,600. Please state whether you ever received any $4,600 of the Eastern B. & L. Ass'n; state how much you actually received of that association and when and how, and did you receive it from that association directly or from any one at any place as its agent? If so from whom and where?

Answer to 9th interrogatory. I did not receive $4,600. I only received a draft of the Eastern B. & L. Association dated July 8, 1891, on the Trust & Deposit Co., of Onondaga, Syracuse, New York, for $4,140. I received this draft soon after its date and got the money on it from the Union & Planters' bank at Memphis, Tennessee, about July 16, 1891. I got the draft through either H. B. Martin *of* J. H. T. Martin, in Shelby county, Tennessee. The difference between the $4,600 and the draft, $4,140, was the fixed premium or deduction of ten per cent. which was taken out by the Co. I got the draft from Martin as agent of the Eastern B. & L. Ass'n, in Shelby county, Tennessee.

Int. 10th. When you applied for the shares and applied for the loan or advance, to whom did you apply and at what place?

Answer to 10th interrogatory. I applied either to H. B. Martin or J. H. T. Martin, the agents at Memphis, Tennessee. H. B.
106 Martin first called my attention to the Eastern B. & L. Association of Syracuse, N. Y., which I did not know of before.

Int. 11th. Who appointed the appraisers, Geo. C. Rudisell, C. B. Galloway and J. H. T. Martin, and were they or not residents of

Shelby county, Tennessee? Did you appoint them and for whom were they acting?

Answer to 11th interrogatory. I do not know who appointed the appraisers, but suppose that the local board did. The appraisers were residents of Shelby county, Tennessee. I did not appoint them, they were acting for plaintiff.

Int. 12th. For whom were H. B. Martin and J. H. T. Martin, in all of the transactions testified by you, acting; were they acting for you or for the Eastern Building & Loan Association of Syracuse, N. Y.?

Answer to 12th interrogatory. H. B. Martin and J. H. T. Martin were not acting for me. They were acting for plaintiff or the local board, for which I cannot say.

Int. 13th. When you made your application for shares in the Eastern B. & L. Ass'n of Syracuse, and your application for a loan from them were H. B. Martin and J. H. T. Martin, either or both engaged as agents of the Eastern B. & L. Ass'n of Syracuse, N. Y., in Shelby county, Tennessee, in getting up business for said association and were your transactions with that association in consequence of the effort of such agents or not?

Answer to 13th interrogatory. My transactions were with H. B. Martin and J. H. T. Martin as agents of plaintiff, and in consequence of the efforts of such agents. The Martins were engaged in getting up business for the plaintiff and got up the business with me.

Int. 14th. It appears that you gave 78 notes to the Eastern B. & L. Ass'n of Syracuse, N. Y., dated May 1st, 1891, and falling due monthly, the first note due last Saturday of May, 1891, and monthly thereafter; were not all of these notes represented and embraced in the $4,600 or $5,683.08 secured by the mortgage you executed? If so, explain as to the notes that fell due before you got the money advanced you by the Eastern B. & L. Ass'n and which money was included in said notes. Where were all these notes executed and to whom were they delivered by you and who attended to the matter for the Eastern B. & L. Ass'n?

Answer to 14th interrogatory. The $5,683.08 represents the 78 notes secured by the mortgage. The notes were all executed in Shelby county, Tennessee. After they were executed they were de-
107 livered to the Martins, in Shelby county, Tennessee, as agents of the plaintiff. These same agents attended to the matter for the plaintiff. On July 15th, 1891, I gave J. H. T. Martin a check on the Union & Planters' Bank of Memphis for $192.08. I had previously paid $34.50 for dues on stock in the Eastern B. & L. Ass'n, for May, 1891. On July 16th, 1891, my notes for $72.86, each due in May and June, 1891, were past due and the note for $72.86 falling due in July, 1891, would soon be due. These 3 notes amounted to $218.58. I was credited with the $34.50. I had paid and I gave the check for $192.08 to pay the balance on the notes for May, June and July, 1891. I annex the check hereto as Exhibit A. The $192.08 was intended for the balance, but there was a slight error in amount. I can't explain now the discrepancy.

Int. 15th. How did you pay the various notes that you did pay—to what person and were the notes in Memphis when you paid them?

Answer to 15th interrogatory. I paid at first the agents, H. B. Martin and J. H. T. Martin, in Shelby county, Tennessee, and took up the notes from them. Afterwards I paid the money to E. B. Lacey, a cashier of the Shelby county, Tennessee, savings bank. I take it for granted I was notified to do so. I don't know whether the notes were in Memphis or not when I paid Lacey, but I afterwards got them, if they were not. I do remember once when I made a payment to Lacey that the note was not here, at which I was surprised. My general transactions with Lacey were to send in a check and afterwards get the note for which it was a payment, but as to the one payment I mention I called in person to pay and the note was not there.

Int. 16th. In returning notes to you that were paid, and in sending you papers of any kind, did you receive them directly from the association or from its agents? And were all of your transactions with the association or with its agents?

Answer to 16th interrogatory. While the Martins were acting as agents of plaintiff, all of my transactions with plaintiff were through them and I paid notes to them and got notes when I paid from them. I have already explained as to Lacey as well as I can.

Int. 17th. What understanding, if any, did you have before and at the time the notes were executed by you as to where the sums represented by the notes were to be paid and with whom was such understanding?

Question and answer objected to by plaintiff, because the notes and contract must speak as to this.

Answer to 17th interrogatory. I thought I could make the
108 payments here in Memphis, Tennessee, and did do so as I have stated. I told one of the Martins that I did not want to be troubled in getting exchange to send on to New York.

Cross-examination by Mr. MINOR:

Cross-int. 1. I hand you the following papers, which have been filed in this suit: (1) Mortgage on certain lands in Shelby county, executed by you and Mrs. Lou M. Bedford to the Eastern B. & L. Association, to secure payment of a debt due by you to the said association; (2) a lot of notes bound together, fifty-three (53) in number, all dated May 1, 1891, executed by you, payable to said association; fifty of them for $72.86 and the last three (3) for $38.36. Did you sign and execute said papers; and did your wife, L. M. Bedford, join you in the execution of the mortgage?

Ans. Yes.

Cross-int. 2. Did you sign and execute all the papers which are exhibits to the deposition of D. A. Pierce, and which purport to have been executed by you, and are the signatures "H. L. Bedford" on all of said papers your genuine signatures?

Ans. Yes. They are my genuine signatures.

Cross-int. 3. Did you know what you were signing when you signed all the papers mentioned in the foregoing questions? Were you aware at the time of executing them of what their contents and purport were?

Ans. Yes, but to tell the truth about it, I didn't pay a great deal of attention to the matter.

Cross-int. 4. You don't claim then that there was any misrepresentation, concealment, or anything approaching found about the transactions had by you with the complainant or with its agents?

Ans. No. My only misapprehension was as to the powers of the local board. I thought that they had greater powers than they actually had.

Cross-int. 5. What efforts did you make to find out the real powers of that board?

Ans. None at all. I had known Martin a long time and simply relied upon him; did not investigate as much as I probably should have done.

Cross-int. 6. You knew all the time that the Martins were agents merely; that the complainant association was a New York concern and had its headquarters in New York State, and that it was Martin's principal?

Ans. Yes.

109 Cross-int. 7. When you say in your answer to direct Int. 6, that the complainant association was doing business in Shelby county, Tenn., at the time you had your transactions with them, do you mean to state a fact or an opinion merely? If you state it as a fact, then upon what do you base your knowledge of the fact?

Ans. I mean to state a fact. I base my knowledge upon their agents holding themselves out and upon their having a local board and the actual transactions with myself.

Cross-int. 8. Do you know as a fact that the association did any business in Tennessee other than what they did with you?

Ans. I have been informed that the association has filed a bill against Martin.

Cross-int. 9. Do you know the date of any transaction the association had with Martin?

Ans. No. Martin told me he was in the association at the time I applied to him.

Cross-int. 10. You do not know of any other business the association did in Tennessee?

Ans. Not of my own knowledge.

Cross-int. 11. And do you — any of the details of the transaction with Martin, when it was made—what its terms, &c.?

Ans. No.

Cross-int. 12. When you paid the amount due on your note each month to one of the Martins, did you make that payment personally or by letter? And did you get the note back immediately or later?

Ans. My usual course was to pay by check which I would send generally by mail and then the note would come back. Martin told me he had the note and to send the money in to him. The note generally came to me too soon after my sending my check for it to

have come from New York after my payment. (Asked at request of Mr. Heath, counsel for defendants.)

Cross-int. 13. How many notes have you paid?

Ans. I paid twenty five (25); the last one I paid was the one due in May, 1893; the first one I failed to pay is the one due on June, 1893, and is the first remaining in the book of notes filed in this cause and hereinafter referred to—each paid by me was $72.86.

Cross-int. 14. In your answer you deny the execution of the mortgage, and of the various papers which have since made exhibits to Pierce's deposition in this cause? And your answer is sworn to. Do you mean those denials are true, or are they purely formal?

Ans. I didn't have the papers before me so couldn't say at
110 the time as to whether the statements in the bill were accurate or not. I have already in this testimony referred to the papers I executed and acknowledged their genuineness, the papers being now before me. And further deponent saith not.

H. L. BEDFORD.

Oath waived:
MINOR.

Subscribed and sworn to before me at Memphis, Tennessee, this January 11th, 1898.

J. B. CLOUGH,
U. S. Com'r.

EXHIBIT A.

No. —. MEMPHIS, TENN., 7, 16, 1891.

Union and Planters' bank

Pay to the order of J. H. T. Martin, one hundred ninety-two $\frac{8}{100}$ dollars. $192.08.

H. L. BEDFORD.

Endorsed: J. H. T. Martin.

UNITED STATES OF AMERICA, }
Western Division of the Western District of Tennessee. }

In the Circuit Court of the United States within and for the Western Division of the Western District of Tennessee, in the Sixth Judicial Circuit Thereof.

Proceedings had in said court at a regular term thereof, begun and held for its May term, A. D. 1896, at the United States courthouse in the city of Memphis, in said district, on to wit, the 4th day of November, A. D. 1896, in the following cause, to wit:

EASTERN BUILDING & LOAN ASS'N, Plaintiff, }
vs. } No. 487.
H. L. BEDFORD, LOU M. BEDFORD, Defendants. }

For satisfactory reasons to the court appearing it is hereby ordered by the court that the foregoing case be and it is hereby continued to the next November term of the court.

111 No. 487. Circuit court of the United States, western district of Tennessee. E. B. & L. Association *vs.* H. L. Bedford *et al.* Order of court. Entered and filed 4th day of November, A. D. 1896. John B. Clough, clerk.

UNITED STATES OF AMERICA,
Western Division of the Western District of Tennessee.

In the Circuit Court of the United States within and for the Western Division of the Western District of Tennessee, in the Sixth Judicial Circuit Thereof.

Proceedings had in said court at a regular term thereof, begun and held for its November term, A. D. 1896, at the United States court-house in the city of Memphis, in said district, on, to wit, the 20th day of May, A. D. 1897, in the following cause, to wit:

EASTERN BUILDING & LOAN ASS'N, Plaintiff,
vs.
H. L. BEDFORD, LOU M. BEDFORD, Defendants. } No. 487.

For satisfactory reasons to the court appearing, it is hereby ordered by the court that this cause be continued to its next term.

No. 487. Circuit court of the United States, western district of Tennessee. E. B. & L. Association *vs.* H. L. Bedford *et al.* Order of court. Entered and filed 20th day of May, A. D. 1897. John B. Clough, clerk.

UNITED STATES OF AMERICA,
Western Division of the Western District of Tennessee.

In the Circuit Court of the United States within and for the Western Division of the Western District of Tennessee, in the Sixth Judicial Circuit Thereof.

Proceedings had in said court at a regular term thereof, begun and held for its May term, A. D. 1897, at the United States
112 court-house in the city of Memphis, in said district, on to wit, the 28th day of August, A. D. 1897, in the following cause, to wit:

EASTERN BUILDING & LOAN ASS'N, Plaintiff,
vs.
H. L. BEDFORD, LOU M. BEDFORD, Defendants. } No. 487.

For satisfactory reasons to the court appearing, it is hereby ordered by the court that the foregoing cause be and it is hereby continued for orders to the next term of this court.

No. 487. Circuit court of the United States, western district of Tennessee. E. B. & L. Association *vs.* H. L. Bedford *et al.* Order of court. Entered and filed 28 day of August, A. D. 1897. John B. Clough, clerk.

Circuit Court of the United States, Western District of Tennessee.

EASTERN BUILDING & LOAN ASS'N
vs.
H. L. BEDFORD and WIFE. } No. 487.

Stipulation. Filed January 3, 1898.

In this cause it is agreed that the following statements are true and may be taken as true for the purposes of this case:

For defendant, that the following mortgages appear of record in the office of register of Shelby county, Tenn. The mortgagee in said mortgages is the complainant association. The said mortgages convey land lying in said county and State and were executed on the dates hereinafter named.

1. Mortgage from Wm. Short to Eastern B. & L. Association, dated June 1, 1891, acknowledged before H. B. Martin, notary public, in Shelby county, Tenn., June 29, 1891; filed for record June 29, 1891; recorded in Book 206, page 310. Same was to secure 78 notes aggregating $1,482 78, dated June 1, 1891, said notes being payable monthly to complainant association at Syracuse, N. Y.

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2. Mortgage from J. H. T. Martin to Eastern B. & L. Association, dated Sept. 1, 1890; acknowledged before said H. B. Martin, September 22, 1890, in Shelby county, Tenn.; filed for record Sept. 22, 1890, and recorded in Book 204, page 87. Same was to secure 78 notes, dated September 1, 1890, made by said J. H. T. Martin and payable monthly to complainant association at Syracuse, N. Y.; notes aggregating $6,795.36.

3. Mortgage by Thos. E. Edwards to Eastern B. & L. Association, dated Oct. 1, 1890; acknowledged before J. H. T. Martin, a notary public, in Shelby county, Tenn., Nov. 25, 1890; filed for record Nov. 25, 1890, and recorded in Book 197, page 485. Same was to secure 78 notes, aggregating $2,718.30, dated Oct., 1890; payable monthly to complainant association at Syracuse, N. Y.

4. Mortgage to said association by Emma E. and Geo. E. Rudisell and W. B. McMahon, dated Dec. 1, 1890; acknowledged before said J. H. T. Martin, in Shelby county, Tenn.; filed for record Dec. 8, 1890, and recorded in Book 203, page 204. Same was to secure 78 notes, aggregating $4,201.08, payable monthly to said association at Syracuse, N. Y.; notes all dated Dec. 1, 1890.

5. Mortgage to said association by said J. H. T. Martin, dated Jan'y 1, 1891; acknowledged before said H. B. Martin, in Shelby county, Feb'y 12, 1891, and recorded in Book 203, page 392, having been filed for record Feb'y 12, 1891. Same was to secure 78 notes of said J. H. T. Martin, aggregating $8,293.74, payable monthly to said association at Syracuse, N. Y.; said notes were dated Jan'y 1, 1891.

6. Mortgage to said association by H. L. and Louisa S. Tresevant, dated Jan'y 1, 1891; acknowledged before said J. H. T. Martin, in Shelby county, Jan'y 26, 1891; filed for record Jan'y 26, 1891, and

recorded in Book 203, page 313. Same was to secure 78 notes aggregating $3,706.56; payable to said association at Syracuse, N. Y. All notes dated Jan'y 1, 1891, and payable monthly.

7. Mortgage to said association by Annie E. and Edward O. Jenkins, dated Apr. 1, 1891; acknowledged by E. O. Jenkins in Texas, May 9, 1891, and by Annie E. Jenkins before said H. B. Martin, in Shelby county, May 13, 1891; filed for record May 13, 1891, and recorded in Book 205, page 177. Same was to secure 78 notes, aggregating $1,235.52; all dated Apr. 1, 1891, and payable to said association at Syracuse, N. Y., monthly.

114 8. Mortgage to said association by R. B. Pegram and wife, dated July 1, 1891; acknowledged before said H. B. Martin, in Shelby county, Tenn., July 23, 1891; filed for record July 23, 1891, and recorded in Book 205, page 266. Same was to secure 78 notes aggregating $2,639.06; all dated July 1, 1891, and payable monthly to said association at Syracuse, N. Y.

9. Mortgage to said association by Gilbert and Mollie E. Sims, dated July 1, 1891; acknowledged before said H. B. Martin in Shelby county, Tenn., Aug. 8, 1891; filed for record Aug. 20, 1891, and recorded in Book 206, page 380. Same was to secure 78 notes aggregating $551.45; payable monthly to said association at Syracuse, N. Y., all the above mortgagors were residents of Shelby county, Tenn.

For complainant: All of the foregoing mortgages were executed to secure loans obtained by the mortgagors from said association on lands lying in Shelby county, Tenn. The loans were obtained from said association through the same process as that by which the defendant Bedford obtained his.

The borrowers all first become stockholders in said association. The date of the borrower's application for shares was in every one of the above instances at least three months prior to the date of his mortgage and notes; and the shares were issued to each borrower at least three months before the date of his mortgage and notes, and in the three following instances of those above named the dates were as follows: R. B. Pegram; application for shares dated March 25, 1891, date of issuance of shares April 1, 1891, application for loan dated April 13, 1891. Gilbert Sims, application for shares dated Aug. 16, 1890, shares were actually issued to him Aug. 24, 1890, under date of September 1, 1890, application for loan dated May 23, 1891. Wm. and Fannie E. Short, application for shares dated Nov. 22, 1890, shares issued Nov. 25, 1890, application for loan dated May 11, 1891. Annie E. and Edward O. Jenkins, application for shares dated Nov. 5, 1890, shares issued to them on Nov. 11, 1890, application for loan dated Aug. 8, 1890.

For defendants: That the complainant association filed a copy of its charter with the secretary of state of Tennessee on the 11th day of August, 1893, and filed an abstract of same in the office of the register of Shelby county, Tenn., soon after, viz., on Aug. 15, 1893. Nothing else was done by it towards complying with the act of March 26, 1891, or any of the acts.

For complainant: At the times hereinbefore referred to J. W. Bu-

chanan, an attorney practicing at the Memphis bar, was the
115 local attorney and legal adviser of the said association. When the act of March 26, 1891, was passed he advised said association not to sell any more stock in the State until complying with that act; but he further advised that it had a right to make loans on stock already sold in accordance with the rights given to every shareholder under his certificate. And to the best of his knowledge the association sold no more stock after the passage of said act. He does not know whether, after this period, the association made loans or sold stock to parties in Tennessee outside of Shelby county or not. The copy of the complainant's charter made Exhibit A to the deposition of D. A. Pierce, is a true and correct copy of complainant's charter as it existed at time of transactions with defendants, and said copy may be used as evidence in this cause, defendants hereby waiving all proof as to the correctness of said copy.

For defendants: That the complainant furnished its agent in Shelby county, Tenn., with printed blanks to be used in effecting loans and other transactions with parties in Tennessee. The application for shares (Ex. B to Pierce's dep.), the application for loan (Ex. D to Pierce's dep.), and the appraiser's report and affidavits of H. L. Bedford and the appraisers, the application for an advance (Ex. E to Pierce's dep.), and the affidavit of H. L. Bedford of June 20, 1891, attached to Pierce's deposition, were all upon blanks of this description. During the period covered by the transactions with defendants, the complainant made some loans in Tennessee outside of Shelby county. The methods pursued in regard to these loans were similar to those followed in defendant's case. Parties do not know how many of such loans were made.

BUCHANAN & MINOR,
Solicitors for Complainant.
R. M. HEATH, *For Defendants.*

Circuit Court of the United States, Western District of Tennessee.

EASTERN BUILDING & LOAN ASSOC'N
vs.
H. L. BEDFORD and WIFE. } No. 487.

Deposition — H. L. Bedford. Filed January 11, 1898.

Deposition of H. L. Bedford, taken on behalf of defendants in the above cause.

116 Int. 1. Are you the H. L. Bedford who is one of the defendants in this case and whose deposition was filed herein on October 23, 1896?

Ans. Yes.

Int. 2. Please state whether or not you knew of the existence of the various prohibitory acts passed by the legislature of the State of Tennessee in respect to foreign corporations desiring to carry on business in the State of Tennessee, being the acts of Tennessee legisla-

ture as follows, viz: Chapter 31 of Acts of 1877, passed March 19, 1877, and approved March 21, 1877, and appearing at page 44, etc., of the Acts of 1877; chapter 2 of the Acts of 1891, passed March 26, 1891, approved March 28, 1891, and appearing at page 17 of the Acts of 1891; chapter 95 of Acts of 1891, passed March 10, 1891, and approved March 17, 1891, and appearing at page 212 of the Acts of 1891; chapter 122 of the Acts of 1891, passed March 21, 1891, and approved March 26, 1891, and appearing at page 264 of the Acts of 1891, at the time you made the transactions with plaintiff referred to in this suit and in your previous deposition; did you know of above acts or any other acts of the Tennessee legislature on that subject when you had such transactions? And did you know or not that the Eastern Building & Loan Association of Syracuse, New York, had not complied with said laws of Tennessee when you had such transactions?

Ans. When I had the transactions with the Eastern Building & Loan Association of Syracuse, N. Y., I did not know of the existence of any laws passed by the legislature of the State of Tennessee in respect to foreign corporations doing business in Tennessee. I knew nothing about any such laws or that they were in existence until after my note due in June, 1893, fell due and I failed to pay it. After that I heard there were some laws of the Tennessee legislature or a decision of the supreme court of Tennessee on the subject, and after this suit was brought I had an examination made into the matter. I never knew until after this suit was brought what the Eastern Building & Loan Association of Syracuse, New York, had done as to complying with the Tennessee laws as to foreign corporations. After this suit was brought I had the matter examined into. I did not know there were any laws requiring the foreigh corporation to do anything preliminary to carrying on business in Tennessee or that there had been any failure to comply with such laws.

Int. 3. Do you know or can you set forth any other matter
117 or thing besides what you have testified to in this and your previous deposition which may be a benefit or advantage to the parties at issue in this cause or either of them or that may be material to the subject of this your examination or the matters in question in this cause? If yea, set forth the same fully and at large in your answer.

Ans. I don't know anything further.

Cross-examination:

Cross-int. 1. Where were you educated, Col. Bedford, and in what lines did your education extend?

Ans. At Lebanon, Tenn., and at the University of Mississippi. This was where I had my collegiate education.

Cross-int. 2. For what profession were you educated?

Ans. I was first educated for a civil engineer, afterwards for the profession of law. Then after I had secured the degree of A. B. at the Kentucky Military Institute. After studying civil engineering and the law I taught myself farming.

Cross-int. 3. Did you ever practice law?

Ans. I practiced for a while before the war.

Cross-int. 4. In the course of your law studies, did you ever learn the maxim "*ignorantia legis neminem excusat*"?

Ans. I heard of it.

Re-examination:

Re. int. 1. What war do you refer to when you say you practiced before the war?

Ans. I refer to the war between the States, from 1861 to 1865.

And further deponent sayeth not.

H. L. BEDFORD.

Subscribed and sworn to before me at Memphis, Tenn., this January 11, 1898.

T. B. CLOUGH,
U. S. Commissioner.

UNITED STATES OF AMERICA,
Western Division of the Western District of Tennessee.

In the Circuit Court of the United States within and for the Western Division of the Western District of Tennessee, in the Sixth Judicial Circuit Thereof.

Proceedings had in said court at a regular therm thereof,
118 begun and held for its November term, A. D. 1897, at the United States court-house, in the city of Memphis, in said district, on, to wit, the 21st day of May, A. D. 1898, in the following cause, to wit:

EASTERN BUILDING AND LOAN ASSOCIATION, Plaintiff,
vs.
H. L. BEDFORD, LOU. M. BEDFORD, Defendant-. } No. 487.

For satisfactory reasons to the court appearing it is hereby ordered by the court that the foregoing case be and it is hereby continued to the ensuing May term of this court.

No. 487. Circuit court of the United States, western district of Tennessee. Order of court. E. B. and L. Association *vs.* H. L. Bedford *et al.* Entered and filed 21st day of May, A. D. 1898. John B. Clough, clerk.

Circuit Court of the United States, Western District of Tennessee.

EASTERN BUILDING AND LOAN ASSOCIATION
vs.
H. L. BEDFORD and WIFE. } No. 487.

Exceptions to Deposition. Filed May 25, 1898.

Exceptions of H. L. Bedford and Wife to the deposition of D. A. Pierce.

First. Defendants except to the answer to direct interrogatory 5½, when witness says, referring to H. L. Bedford and the shares or certificates of shares "he still retains them with the exception that they have been pledged by him to the complainants as security for the loan or advance thereon, made him by the complainant." The witness, in direct answer No. 20, refers to the following endorsement on the back of the certificate of shares issued to H. L. Bedford, viz: "The within mentioned shares of stock in the Eastern Building and Loan Association of Syracuse, N. Y., are hereby withdrawn,
119 and I have this day received the sum of forty-six hundred dollars in full of the amount due me by such withdrawal. Dated at Memphis, 7, 16, 1891. H. L. Bedford. (Seal.) Witness, J. H. T. Martin." The said witness referring in said twentieth answer to the above says it "is simply the form used at the time for pledging the stock as collateral to the loan in compliance with sec. 3 of article 14 of the by-laws printed on the back of said certificate." Defendants except to the portion of the answer to direct interrogatory 5½ quoted because the witness undertakes to testify as to the legal effect of the endorsement withdrawing the shares above quoted. It is for the court to construe such paper and endorsement and to say what the effect thereof was and is, and testimony on this point is incompetent.

Second. Defendants except to direct question and answer No. 7. In the interrogatory the witness is asked what the effect of the acceptance by H. L. Bedford of the certificate of shares was, and in his answer he attempts to show what the effect thereof was and is. This is purely a legal question to be determined by the court upon the facts of this case. In his answer the witness constitutes himself judge and undertakes to decide questions which only the court can decide.

Third. Defendants except to the statement of the witness in the answer to the 10th direct interrogatory, where the witness in undertaking to state why the loan or advance was made to H. L. Bedford says that he was to or did "pledge said shares of stock as collateral to said loan." The witness produced the instrument showing what Bedford did in regard to said shares, and it is for the court to construe said instrument and say what was the legal effect thereof and not for the witness to do so.

Fourth. Defendants except to that portion of direct interrogatory No. 11, saying, "and do you know of anything that affects the validity of such mortgage?" And to the answer of the witness

thereto, saying: "I know of nothing that affects the validity of said mortgage." The validity of the mortgage and of the transactions *are* to be determined by the court upon the facts in evidence and not by the testimony of the witness that the transactions were valid.

Fifth. Defendants except to direct interrogatory No. 12 and the answer thereto. The testimony of the witness as called for and given that Bedford was necessarily bound by the by-laws, rules and regulations of the association on becoming a member, and there is no way by which he might be exempt from their operation in whole or in part. It is for the court to determine whether Bedford was bound or not and witness' testimony that he was bound and could not be exempt is incompetent.

Sixth. Defendants except to direct answer 14 where the witness undertakes to say all the notes are due and that he knows of no equities against them or reasons why they should not be collected. It is for the court to determine whether the notes are due and collectible, and not for the witness to determine.

Seventh. Defendants except to the testimony of the witness in the answer to the 19th direct interrogatory, saying: "The loan to Bedford was made in conformity with the rules, regulations and by-laws of the association." The witness can only state what was done and it is for the court to determine whether the same was in conformity with said rules, etc.

Eighth. Defendants except to that part of the answer to direct interrogatory No. 20 referring to the agents of plaintiffs, saying: "They had no authority to bind the association in any way, being simply soliciting agents and had no authority to enter into any agreement in relation thereto," and to that part of same answer saying: "As will be seen from the foregoing, they were simply soliciting agents working upon a commission basis and having no power to enter into contracts or to incur any obligations for or on behalf of the association." Defendants further except to that part of said answer, saying: "The officers of the local board, however, had no authority to incur any obligations for or on behalf of the association," and to that part of said answer, saying that if persons "chose to remit through the local treasurer, it should be through him as agent for themselves and not for the association." The defendants further excepts to that part of the same answer referring to an "application by various persons of Memphis for a local-board charter for that city, from which it will also be seen that it was the express understanding and agreement that the local-board treasurer remitted as agent for the members who made payments to him and not as agent for the association." Defendants except to the testimony of the witness referred to above because it is for the court to determine whether the agents could bind the plaintiffs and to what extent, and that the witness in his testimony should be confined to a statement of the facts and not be allowed an expression of his judgment or opinion that the agents could in no way bind or affect the association.

Ninth. Defendants except to that part of answer to direct
121 interrogatory 20th, saying the paper signed by Bedford, dated at Memphis, 7, 16, 1891, is simply the form used at the time for pledging the stock as collateral." The paper in question does not purport to be a pledge, but an absolute withdrawal, and it is for the court and not the witness to construe said paper, and say what the effect thereof is.

Tenth. The defendants object to all testimony as contained in the deposition of said witness when he undertakes to give his opinion, because in cross answer No. 21 he shows he testifies as a lawyer. It is for the court to decide this case and the questions therein and not the witness and all expressions of opinion that plaintiff is right and defendants are wrong are excepted to.

R. M. HEATH, *Solicitor.*

UNITED STATES OF AMERICA,
Western Division of the Western District of Tennessee.

In the Circuit Court of the United States within and for the Western Division of the Western District of Tennessee, in the Sixth Judicial Circuit Thereof.

Proceedings had in said court at a regular term thereof, begun and held for its May term, A. D. 1898, at the United States courthouse, in the city of Memphis, in said district, on, to wit, the third day of June, A. D. 1898, in the following cause, to wit:

EASTERN BUILDING & LOAN ASS'N, Plaintiff,
vs.
H. L. BEDFORD, LOU M. BEDFORD, Defendants. } No. 487.

This cause came on to be heard upon the exceptions of H. L. Bedford and wife, filed May 25, 1898, to the deposition — D. A. Pierce on file herein, and thereupon the court acting upon said exceptions overruled the first, third, ninth and tenth exceptions, to which action of the court the defendants, H. L. Bedford and wife, then and there excepted. The second, fourth, fifth, sixth and seventh exceptions were sustained, and the evidence objected to was excluded. The eighth exception was sustained, to this extent that all expression of opinion by the witness is excluded as evidence, but
122 the exception is overruled, so far as the witness testifies to the fact that there was no authority conferred on agents except as found in the by-laws of the Eastern Building and Loan Association of Syracuse, New York. The defendants H. L. Bedford and wife then and there excepted to the action of the court, in overruling this exception to any extent. The court overruled the first exception as to the evidence excepted to was explained by witness in direct answer No. 20. The third exception was likewise overruled as the evidence excepted to was explained in other parts of the deposition giving the facts. The tenth exception was overruled as being too general.

UNITED STATES OF AMERICA,
Western Division of the Western District of Tennessee.

In the Circuit Court of the United States within and for the Western Division of the Western District of Tennessee, in the Sixth Judicial Circuit Thereof.

Proceedings had in said court at a regular term thereof, begun and held for its May term, A. D. 1898, at the United States courthouse, in the city of Memphis, in said district, on, to wit, the 4th day of June, A. D. 1898, in the following cause, to wit:

EASTERN BUILDING & LOAN ASS'N, Plaintiff,
vs.
H. L. BEDFORD, LOU M. BEDFORD, Defendants. } No. 487.

This cause came on to be heard this day on the original bill, answer and replication, the exhibits and proof herein filed and the arguments and briefs of counsel, and it appearing to the court that the defendants executed to the complainant a certain mortgage as described in the bill and the exhibits thereto to secure the payment to complainant of the indebtedness therein described, and it further appearing that the defendants have not paid the said indebtedness, but therein made default as charged in the bill, and it further appearing to the court that there is no valid defense against the claim of complainant to foreclose said mortgage and collect said indebtedness of the said defendants, and it still further appearing to the court that the amount now due by the defendants to complain-

123 ant is readily ascertainable from the original bill and the exhibits thereto and the proof filed by complainant and that a reference to the master is not necessary for the ascertainment of said amount, and that said amount is five thousand and seventy-five $\frac{37}{100}$ ($5,075.37) dollars, the same being $4,279.72, with interest from April 29, 1875, the date of the account filed as exhibit to the bill to date. Now, therefore, the court being fully advised in the premises orders, adjudges and decrees that the said defendants are justly indebted to the complainant in the sum of $5,075.37, with interest from the date of this decree until paid together with all the costs of this cause and that the said complainant have and recover of the said defendants the said sum of $5,075.37 and costs of this suit for all of which let execution issue under the terms and provisions hereinafter made in this decree. It is further ordered, adjudged and decreed that the said sum of $5,075.37 is and the same is hereby declared to be a lien on the land and premises conveyed by the mortgage described in the bill, which said mortgage is in evidence in this cause and which land is known and described as follows, to wit: All tract or parcel of land situate in the 10th civil district of the county of Shelby, and State of Tennessee, bounded and described as follows: Beginning at the southwest corner of J. J. Bailey's "Mill place," thence north with the west line eighty-eight and one-half (88½) rods to center of M. & C. railroad; thence east along the center of said railroad fifty-four and one-

quarter (54¼) rods; thence south parallel with the west line eighty (80) rods to said Bailey's south line; thence west along said south line to the place of beginning, containing thirty acres of land more or less; also all that certain tract or parcel situate in said district, county and State bounded and described as follows, to wit: Beginning on the Winchester line at the east line of the John McSwine tract, thence west with the Winchester line three hundred and twenty (320) rods, to John C. McLemore's northeast corner; thence south with the section line two hundred and sixty (260) rods; thence east one hundred and twenty (120) rods; thence north one hundred and twenty (120) rods; thence east two hundred (200) rods to the middle of Center Hill road; thence north with said road one hundred and forty (140) rods to the place of beginning, containing three hundred and seventy (370) acres of land. The above-described premises being the same premises conveyed to said H. L. Bedford by W. B. Lauderdale and wife by deed of date February 10, 1886, and recorded in Book 166, page 406, of the records in the office of the register of Shelby county, Tennessee. Now, if
124 the said defendants shall within ninety days after the date of this decree pay and fully discharge the amount hereinbefore declared and adjudged to be due by them to complainant, to wit, the sum of $5,075.37, with interest from date of decree to time of payment, and shall pay and satisfy all costs of this cause, then the said land shall stand relieved of and released from the lien above declared, and the complainant shall execute and deliver *of* to defendants a quitclaim deed to said defendants for said land and premises and the said defendants shall stand acquit of all indebtedness to complainant which was embraced in its said bill of complaint in this cause. But if the defendants fail within ninety days next after the date of this decree to pay and satisfy the said sum of $5,075.37 hereinbefore adjudged to be due by them to complainant with interest from the date of this decree it is ordered and decreed that John B. Clough, who is hereby appointed special master for making the sale hereinafter provided for, shall, after having advertised the time, terms and place of sale for thirty days in some newspaper published in Shelby county, Tennessee, sell the above-described land and premises at public outcry at the front door of the custom-house in Memphis, Tennessee, within legal hours to the highest and best bidder under the terms of sale hereinafter provided, and it appearing that in the said mortgage the defendants, the makers thereof, expressly waived and relinquished all rights of dower or homestead in said land and premises and the right to redeem the same or any part thereof in case of foreclosure, now in order to bar any right of redemption it is ordered and decreed that the sale be made upon a credit of one-half in six months and one-half in twelve months, the purchaser to give his notes for the purchase-money secured by a lien upon the said land and by satisfactory personal security, and leave is hereby expressly granted to complainant to become a purchaser at said sale if its bid shall prove to be the highest and best and it *may* the amount of its bid with the indebtedness due it as above or so much of same as may

be necessary. The said John B. Clough, special master above named, shall turn over to the clerk of this court all said proceeds of said sale and the clerk shall out of the proceeds pay first a reasonable compensation to the said special master, which said compensation is to be hereafter fixed. Second, he shall pay all the costs of this cause; third, the amount hereinbefore adjudged to be due by defendants to complainant with interest from the date hereof to date of such application or so much thereof as the amount of the fund in his hands shall permit, and, fourth, the re-
125 mainder, if any, to the defendants herein. If, after the payment of the first two items above named, there shall not remain a sufficient amount to fully discharge the amount above adjudged to be due by defendants to complainant, then said sum as actually remains, after the payment of the first two items above named shall be paid to the complainant and credited on the amount adjudged above to be due complainant by defendants. For the remainder due by defendants to complainants execution will issue against the said defendants.

Circuit Court of the United States for the Western Division of the Western District of Tennessee.

EASTERN BUILDING AND LOAN ASSOCIATION
vs.
H. L. BEDFORD and WIFE. } In Equity.

Bill to foreclose a mortgage.

Opinion. Filed June 4, 1898.

By an act of the legislature of the State of Tennessee of March 28th, 1891, ch. 2, entitled "An act to regulate the business of building and loan associations" it was required that no building and loan association, organized under the laws of another State should do business in Tennessee unless said association should deposit and continually thereafter keep deposited in trust for all its members and creditors, mortgages amounting to not less than twenty-five thousand dollars or more than fifty thousand dollars, at the discretion of the treasurer. They were also required before commencing to do business to file with the treasurer of the State a duly authenticated copy of their charter or articles of incorporation and a certificate of deposit of the valid securities required.

By another section the officers, directors or agents of foreign building and loan associations were forbidden to solicit subscriptions to their stock in that State or to sell or knowingly cause to be issued to a resident of the State any stock of the association unless a deposit had been made in accordance with the terms of the act, and it had otherwise complied with its provisions. Agents were required to be licensed by the treasurer, for which they were to pay a fee
126 of two dollars, and he was also to receive a fee of twenty-five dollars for filing the papers mentioned in the act. Any violation of the prohibition against the sale of stock without a compli-

ance with the act was made a misdemeanor, and punished as such by fixed penalties.

By another act of March 17th, 1891, ch. 95, chapter 31 of the Acts of the Legislature of Tennessee for the Year 1877, being sections 1992 to 2003 of Milliken & Vertrees Code, was amended so as to apply that act to corporations, chartered under the laws of other States, known as building and loan associations, and other specifically enumerated corporations.

The act of 1877, carried into Milliken & Vertrees Code was an act for the encouragement of mining and manufacturing corporations, which were required, if desiring to carry on their business in this State to file in the office of the secretary of state a copy of their charters or articles of incorporation, and such corporations were to be deemed and taken to be corporations of this State subject to its jurisdiction, to sue and be sued therein in the mode and manner directed by law in the case of corporations created and organized within the State. Then the act conferred the privilege of acquiring and holding real property, which was made liable for its debts. The act gave resident creditors priority. Taxation was regulated. Rights of way were given for the maintenance of roads, bridges, canals, tramways, telegraph lines, etc.; but they were required to begin business within a year, it being declared to be the object of that act to secure the opening and development of the mineral resources of the State, to facilitate the introduction of foreign capital, etc.; and such corporations were authorized to establish villages and settlements for the use and residence of its employés and others; and the sale of liquor was prohibited within a radius of five miles of such villages and settlements.

Subsequently, by an act of March 26, 1891, ch. 122, this act, ch. 31, 1877, was extended to all corporations chartered or organized under the laws of other States or countries for any purpose whatsoever, which may desire to do any kind of business within the State of Tennessee. This last act further required that a copy of the charter should be filed with the secretary of state and an abstract thereof, in every county in which a foreign corporation desired to do business. And then, by section 3, it was enacted that—

"It shall be unlawful for any foreign corporation to do or
127 attempt to do any business or own or acquire any property in this State without first having complied with the provisions of this act, and a violation of this statute shall subject the offender to a fine of not less than one hundred dollars, nor more than five hundred dollars, at the discretion of the jury trying the case."

And, by section 4 when the corporation had complied with the provisions of the act it should be to all intents and purposes a domestic corporation of the State, and if it had no agent in the State upon whom process could be served it was liable to attachment, to be levied upon any property owned by the corporation. The last section of the act re-enacted the provisions of chapter 31 of the Acts of 1877, thus extending all the privileges of that original act to all corporations whatever, coming into the State to do business.

The plaintiff is a building and loan association of the State of

New York, having its location at the city of Syracuse, which has never complied or attempted to comply, except as hereinafter stated, with any of the foregoing acts nor with as subsequent act known in the legislation of the State as the "curative act" of May 10th, 1895, chap. 119, which authorized corporations that had been doing business in the State contrary to the provisions of the former act, to file their charters as required, and be relieved of the penalties and forfeitures incurred, but with the important provision that no suit should be instituted upon any contract thus made valid until after two years from the passage of the act.

By the charter of the plaintiff company it was authorized to establish a local board anywhere, to be composed of its members in that locality to assist in carrying on its business, it being a mutual company. It had a firm of agents in Memphis, Shelby county, Tennessee, and also a local board, composed of members thereabouts. On the 23rd day of January, 1891, before the passage of any of the foregoing acts, except that of 1877, the defendant signed in Shelby county, Tennessee, a written application for shares in the plaintiff association in the form prescribed for the purpose, and customary in doing its business. This application was forwarded by mail through the above agents to the plaintiff company, at its home office in Syracuse, New York. The application was granted by the board of directors at the home office, and on February 2nd, 1891, a certificate for forty-six shares of the stock, amounting to forty-six hundred dollars, was issued to the defendant, being sent to him by mail through the Memphis agents. According to the scheme of the company this stock was to mature by the
128 payment of its dues and assessments on the first of August, 1891. These dues and assessments were payable at its home office, in Syracuse, N. Y., but a by-law authorized them to be paid to the local board or agent where the stockholder resided, if the stockholders so desired.

On March 20th, 1891, the defendant made a written application for a loan, which, according to the custom of the company, was sworn to, and appraisers appointed by the local board indorsed on the application a sworn appraisement of the property which was offered as security. In this application for a loan of forty-six hundred dollars for six and a half years, it was stated that the loan was to bear interest at the rate of 5 per cent. per annum and a premium of 5 per cent. per annum payable annually on or before the last Saturday of each month, "all payments to be made as the lender may direct," and to secure the same the defendant agreed to give a mortgage upon the property offered as security. This application and appraisement, like the application for stock, was sent by the agents through the mail to the home office, at Syracuse, New York; and on the 18th of May, 1891, the board of directors at Syracuse, in the State of New York, recommended and approved the loan. Subsequently, Bedford made a written application, again sent through the mails, for what is called "an advance of loan," and referred to the resolution of the board of directors of May 18th, 1891, allowing the advance at "a premium of ten per cent.," attached to which

written application was the affidavit of one of the agents, which was again forwarded to the board of directors by mail. The defendant and his wife then executed a mortgage upon real estate situated in Shelby county, Tenn., dated May 1st, 1891, duly and properly acknowledged June 18th, 1891, filed for record June 20th, 1891, and duly recorded in the register's office of Shelby county. This mortgage acknowledged the receipt of forty-six hundred dollars and secured the sum of $5,683.08, the same being the principal, interest and premium of the loan, evidenced by seventy-eight notes, dated Memphis, Tenn., May 1st, 1891, payable to said association at its office, in Syracuse, monthly." Having signed these notes at Memphis and recorded this mortgage, they were again forwarded by these agents, through the mail, to the home office, in the city of Syracuse, New York, and, thereupon the plaintiff company drew its draft on the Bank of Onondaga, at Syracuse, N. Y., in favor of the defendant, for the sum of $4,140, which, in due course of business was paid to him, or to his order, at Syracuse, New York.

129 The shares of stock were withdrawn, duly receipted for, according to the customary method of doing business.

The plaintiff company filed a copy of its charter with the secretary of state, on August 11th, 1893, and an abstract thereof in Shelby county, on August 15th, 1893, more than two years after the completion of this transaction, and before the passage of the curative act. The seventy-eight notes executed were all dated May 1st, 1891. Each was for $72.86, except the last three, which were each for the sum of $38.36. They were all payable to the order of the plaintiff company at its office, in Syracuse, New York, the first on or before the last Saturday of May, 1891, and each successive one on the last Saturday of every month thereafter up to and including the last Saturday of November, 1897. These notes represented the amount of dues estimated to mature and become payable on the shares of stock which the defendant held until the same should mature and reach their par value from the payment of the dues, together with the earnings thereon and the interest and premium advance during that period. The shares of stock were also pledged as collateral security in addition to the mortgage.

The mortgage itself contained stipulations to pay the principal, interest and premiums and to conform to the constitution and by-laws of the order, pay the fines and penalties prescribed thereby according to the true intent and meaning of the articles of association, keep the buildings on the premises insured against loss by fire, to pay all taxes, and to perform all other necessary things relative to said premises, which were imposed by the contract and by-laws of the association. The defendant further agreed to pay the monthly installment dues of seventy-five cents on each share. There was also a provision that if he should fail to pay any of the notes, shares or dues, the whole should become fully due and payable; that the shares of stock should be forfeited and the mortgage and contract should be immediately enforced.

The notes were all paid up to and including the last Saturday of

June, 1893, since which time none of the notes, assessments, or dues have been paid.

This bill was filed to enforce the contract and foreclose the mortgage, on the 24th of June, 1895, a little more than thirty days after the passage of the curative act, and before the two years limitation thereof had expired.

130 HAMMOND, *J.*:

The defense in this case is without a particle of merit, the defendant having received nearly five thousand dollars of the plaintiff's money upon a loan secured by a mortgage upon his property in the ordinary way of such transactions. There is no reason why he should not pay the money back and no defence is offered except that the plaintiff being a foreign corporation had no right to make the loan until it had complied with certain administrative rules and regulations of the State of Tennessee, concerning foreign corporations.

Naturally, repudiation of a debt admitted to be just, finds its protest at the bar from the plaintiff's counsel. That protest also must find response in judicial judgment, unless the courts are compelled to sustain the defense upon some inexorable principle of law having its only justification in the maxim, *ita lex scripta est.*

For my part, I am not prepared to concede to State legislation that unrestrained absolutism of power over foreign corporations which is being built up by the usurpation and enlargement of the recognized right to regulate foreign corporations doing business in the State. Those corporations are not outlaws from all constitutional protection, because of this power to regulate them, nor because of a power to prohibit them from doing business in the State. That power of regulation or prohibition does not necessarily mean a power to forbid their home contracts with citizens of the foreign State and about property in that State. It is not more imperious than the equally vaunted police power of a State which it was said by the Supreme Court "cannot be put forward as an excuse for oppressive and unjust legislation." Per Mr. Justice Brown, in Holden *v.* Hardy (Feb. 28, '98), 169 U. S., —; New Orleans *v.* Davidson, 95 U. S., 465; Yickwo *v.* Hopkins, 118 U. S., 356. And, as in the case of the police power, this exaggerated claim of absolute power over foreign corporations has received its check, first in the dissenting opinion in Hooper *v.* California, 155 U. S., 648, 657, and now in the judgment of the full court in Allgeyer *v.* Louisiana, 165 U. S., 578, and that, too, in relation to legislation similar to that set up by this defense. What may be called the constitutional freedom of trade or right of contract as against such legislation has been fully sustained by the latest of these decisions both as against the police power, where the public health, morals or safety is not involved, and this power to regulate or prohibit the business of foreign corporations. "The question in each case," says Mr. Justice
131 Brown, in Holden *v.* Hardy, *supra*, "is whether the legislature has adopted the statute in exercise or a reasonable dis-

cretion or whether its action be a mere excuse for an unjust discrimination, or the oppression, or spoliation of a particular class."

When asked what public policy was at the back of the legislation of 1891, forbidding foreign corporations to do business in the State without having first registered their charters in every county in the State in which they proposed to do business and acquire property, counsel for the defendant replied that it was to prevent irresponsible corporations from getting a footing in the State and to advise the people as to the charter rights and privileges of the companies.

Plainly this is only administrative in its character, and is in no sense at all a policy which affects the health, morals or general safety of the public, and, as applied to a contract like that we have under consideration there is no effect of the policy that in any sense disparages the contract. It is as harmless as it was before and in the nature of the public policy there is nothing to invoke that kind of protection which usually falls within the police power; and it is somewhat misleading, therefore, to attack the contract as being against public policy. The statute makes no distinction between responsive and irresponsive companies. Either may establish themselves by registering their charters.

As to the matter of information the defense has rather a flimsy foundation, for it is far more likely that any one dealing with the corporation would depend upon the abundantly printed and circulated forms of the charter which in this day of cheap printing and rapid communication is all-sufficient for the purposes of information, without the trouble of going to the county-seat to inspect the records. There does not seem to be much in this suggestion to invoke the principle of public safety or even the public welfare as a foundation for the policy stated. It is not to be presumed that the object of the legislature was to make repudiation easy by furnishing a defense like this to the vast number of people who have resorted to the loan and mortgage companies to borrow money which they could not get at home and get abroad at cheaper rates. Possibly the oft-reiterated charge that the real purpose of the legislation was to make fees for the registration officers in the different counties may furnish a clue to the kind of public policy which is the foundation of the legislation; but evidently, forfeitures of contracts are not to be enforced by the courts in aid of a public policy like that un-
132 less it must be done in loyal obedience to the command of the legislature. Certainly it does not fall within the class of cases mentioned by Mr. Justice Brown in Holden *v.* Hardy, where the legislature may impose limitations upon the right of contract to prevent detriment to the well-being and safety of the people or their property. It cannot be denied, nevertheless, that the legislature of Tennessee had the right, and the courts must enforce it, to require foreign corporations to comply with these regulations and might affix any pains and penalties for that purpose which the legislature might choose—and that has been done by this act; so that if we had the malefactors against its prohibitions, and this were a case to enforce those penalties as in Hooper *v.* California, *supra*, we might be compelled to do it.

But when it is claimed that this act makes the contract between the borrower and the lender void or non-enforceable in the courts, it is another matter, which requires the strictest scrutiny before such a penalty can be invoked against the natural justice and the greater public policy of encouraging the enforcement of fair contracts and compelling borrowers to repay the money which they have borrowed.

It seemed to be conceded in the argument by the plaintiff's counsel that the supreme court of Tennessee does not recognize any distinction between statutes which in their terms declare that a contract shall be void as one of the penalties imposed, and those which do more than prohibit the doing of a thing and impose a penalty; and that by our Tennessee law if the thing is prohibited any contract concerning it is void without any explicit declaration of the statute to that effect, and without reference to the fact whether the statute imposes other penalties or no. Stephenson *v.* Ewing, 87 Tenn., 46; State *v.* Insurance Co., 92 Tenn., 420; Hayworth *v.* Montgomery, 91 Tenn., 16; Anderson *v.* R. R. Company, 91 Tenn., 46; R. R. Company *v.* Evans, 66 F. R., 809.

It is not necessary in this case to go into a critical examination of the Tennessee cases to determine whether or not they go to the extent of declaring the contract void or only to that of declaring that the courts of Tennessee will not enforce them, which, be it remembered, are two distinct results, the difference being all-important. If the contracts be void they should not be enforced anywhere, but if there be only a prohibition on the courts of the State from enforcing them they might be enforced elsewhere; and as well probably in the Federal courts sitting in the State of Tennessee, which
133 are not subject to the prohibitions of the Tennessee legislature relating to the State courts. We are relieved from any considerations like these from the fact that this contract, in our judgment, was one over which the State of Tennessee had no power whatever, except possibly to deny its enforcement by the courts of Tennessee, though that is very doubtful.

This was a New York contract; made in New York, to be performed there, and not in any sense a Tennessee contract. The making of such a contract is not doing business in Tennessee and does not fall within the prohibitions of the statute. Essentially, it is not different in respect of this from the contract in the case of Allgeyer *v.* Louisana, *supra*, 165 U. S., 578; nor Pioneer Savings Co. *v.* Cannon, 96 Tenn., 599; nor Lauter *v.* Jarvis-Conklin Mortgage Co., 85 F. R., 894; nor Caesar *v.* Cappell, 83 F. R., 403; nor Jarvis-Conklin Mortgage Co. *v.* Wilhoit, 84 F. R., 514.

It is contended that the case of New York National Building and Loan Association *v.* Cannon (Knoxville, Sept., 1897) 41 S. W. R., 1054, — Tenn. — has authoritatively settled that the contract is void and that the Federal courts are bound by that decision. It does not appear from the report of that case whether the notes were payable in New York or Tennessee, though an inference that they were payable in New York is insisted upon by counsel for the defendant. It is true that in that case it was decided that the

building and loan association was doing business in Tennessee contrary to the prohibitions of the statute, citing Lumber Co. *v.* Thomas, 92 Tenn., 589; Manufacturing Co. *v.* Gordon, 93 Tenn., 597. But it is to be particularly noted that the court does not decide that the contract was void no matter whether it was a New York or a Tennessee contract, but only that "the court of chancery appeals was correct in holding that the contract was illegal," and could not be enforced by the court and in refusing to foreclose the mortgage of the building and loan association." If that be true of the Tennessee State courts it is not necessarily true of the Federal courts, as before intimated. It is a familiar principle that the Federal courts do not follow the penal statutes, imposing penalties of prohibition that relate only to matters of procedure and practice or to matters of jurisdiction. The legislature of a State cannot shut up the Federal courts nor deny parties access thereto. They may prescribe rules of property and declare contracts within their jurisdiction null and void, and thereupon the Federal courts will enforce the rules of property and refuse to enforce the void contracts;
134 but if the legislature leaves the contract valid, enabling the parties to enforce it within jurisdictions that are not amenable to the legislature of the State of Tennessee, I see no reason why the Federal courts may not enforce such contracts, although their enforcement is prohibited to the courts of the State.

This is not, however, to be misunderstood as applying to those cases where the legislation is the exercise of a police power, which fixes a public policy that appertains to the health, morals or safety of the State, to use again the language of Mr. Justice Brown in the case above cited. That class of cases is very near akin to those constituting rules of property. At all events the Federal courts will not enforce contracts that are vicious because they are contrary to the declared will of the legislature exercising that care for the health, morals or safety of the public, to which we have adverted. But it does not follow from this that they will refuse to enforce valid contracts that are harmless in themselves and non-enforceable in the State courts, only because they are not in conformity to certain prescribed preliminary rules and regulations of an administrative character necessary to be complied with before suit can be brought upon them in the State courts. I do not stop to sup-ort this enunciation by the citation of authorities for the reason that it is not depended upon in favor of this judgment.

Whatever respect we may and should have for the adjudications of the supreme court of Tennessee in construing State statutes, it is not imperative that we shall follow a decision which is contrary to our own Federal decisions above cited, and one which has been made long after this contract was entered into and after the rights of the parties therein had fully attached. In such cases it is open to us to follow our own decisions and exercise our own independent judgment as to the validity of these statutes.

The rule upon this subject is nowhere so well expressed as in the case of Louisville Trust Co. *v.* City of Cincinnati, 76 F. R., 296, in which case Judge Lurton was careful to collate the cases on the

subject and to declare the correct rule for our guidance. Burgess *v.* Seligman, 107 U. S., 20.

Another observation upon the case of The New York B. and L. Ass'n *v.* Cannon, *supra*, is worthy to be noted here, and that is that although the contract was declared illegal and not enforceable in the State of Tennessee, the result was so shocking to the sense of justice of that court that it resorted to the well-known prin-
135 ciple that one asking equitable relief must himself do equity and compelled the debtor to repay the money borrowed out of the funds realized by the sale of the property, notwithstanding the so-called illegality of the contract, thereby substantially enforcing it, notwithstanding the prohibitions of the statute.

But conceding all that may be claimed for that case, and admitting that it is a fair inference from the statement of facts that that contract like this was to be performed in the State of New York and not in the State of Tennessee, the final and all-sufficient answer to it is that if the supreme court of Tennessee has properly construed the statute, it is, in our judgment, declared unconstitutional by the Supreme Court of the United States in the above-cited case of Allgeyer *v.* Louisiana, 165 U. S., 578, just as a similar statute of Louisiana similarly construed by the supreme court of that State was declared unconstitutional.

In Caesar *v.* Cappell, *supra*, this court had occasion to examine the authorities upon which the ruling is based that a promissory note payable in the State of New York is a New York contract to which the giving of a mortgage in Tennessee is only an incident and not a part of the contract, and it is only necessary to refer to the reasoning and treatment of the cases found in that opinion. I adhere to that opinion, and hold that the facts in this case which are not unlike the facts in that case, do not change the rule there laid down. It is true that there is much more ground on the facts of this case for the contention that the business was done in Tennessee than there was in the case of Allgeyer, above cited, but this is only a superficial view of the subject. In the Allgeyer case the property insured was in the State of Louisiana; the owner making the contract of insurance was in Louisiana; that which he did to put the contract into being was done in Louisiana, by writing and depositing a letter in the post-office at New Orleans. The agency which he used in his business was the telegraph and its operators or the post-office and its officials. They were all in Louisiana and necessary agencies in the completion of the contract, and yet it was held that this was not doing business in the State of Louisiana because the contract was to be performed in New York, the premiums were to be paid there, the losses, if any, were to be paid there, which made it a New York contract, and the Supreme Court say that if the supreme court of Louisiana was correct in holding that the Louisiana statute forbade the doing of those things in Louisiana because the company had not complied with statutes of
136 prohibition similar to this we have in this case, that the statute was in violation of the fourteenth amendment to the Federal Constitution by depriving the parties of their liberty with-

out due process of law—that is to say, the freedom to make a contract of insurance to be performed in the State of New York.

We must not be misled by the suggestion of counsel for the plaintiffs that in the Allgeyer case it was especially noted that the defendant had no agent in Louisiana, thereby inferring that if the company had had an agent in Louisiana the decision would have been otherwise. That is a mistaken reading of the case. The constitution of Louisiana contained a provision that no foreign corporation should do business in the State without having one or more known places of business and an authorized agent or agents in the State upon whom process might be served, and the court adverted to the fact that there was no known place of business and no agent in the State as a circumstance to show that the company was not doing business in the State and as an indication of what was meant by that phraseology in the legislation then under consideration. It is not at all to be inferred from this that if the insurance company had made this contract through the agency of some solicitor who performed the function of mailing the correspondence by which it was effectuated instead of that correspondence being mailed by the insured himself, that the decision would have been otherwise than it was, and that is all the difference there is in this case. There, Allgeyer wrote and mailed his own letters which were necessary to complete the contract. Here, the defendants' application and subsequent acceptance were also transmitted through the mails albeit by the instrumentality of his own agents or fellow-members of the building and loan association acting in the city of Memphis. These were only his messengers or agents, to put his letters in the mails.

The essential facts are that he applied in the State of New York by mail for a loan and the acceptance of his offer was had in the State of New York and transmitted to him by mail through the same agents as before. The contract was that he would pay the money, principal and interest, in New York, which made it a New York contract, and the fact that the debtor gave him the privilege of paying it here in Memphis if he chose to do so, does not at all affect that circumstance. The most that can be said upon the facts of this case is that the preliminary negotiations for the contract took place in Tennessee. It may be that the agents through whom they were carried on were, in the sense of the Tennessee
137 statute as to those negotiations, doing business in that State contrary to the statute; and it may be that the Supreme Court will refuse to hold that the fourteenth amendment protects the defendant in his right to borrow money in the State of New York, and to mortgage his Tennessee land as security for it if he does the business through such agencies; and may confine that valuable constitutional protection to the bare use of the mails, but I do not see why any such distinction should be made. If it be a sound distinction the utmost that can be claimed is that the preliminary negotiations themselves were illegal and subjected the offending parties to the penalties of the statute, as in Hooper *v.* California, *supra*, but this does not change the ultimate fact that the

defendant here and the plaintiff there entered into a contract in the city of Syracuse, New York, for the loan of the money and the mortgage of the property. It was there in Syracuse that their minds came together through whatever agencies may have been used for that purpose, and the contract of lending or borrowing and mortgaging was done in the city of Syracuse, New York, and not in the city of Memphis, and therefore the statute of Tennessee has no application to it. That part of the business was not done in Tennessee, and it is only that part with which we are dealing in this case.

I understand the case of Allgeyer *v.* Louisiana to settle that it is not within the competency of the legislature to prohibit a citizen of Tennessee from borrowing money in New York from a citizen of New York and giving a mortgage upon his property in Tennessee to secure it and the fact that the lender is a New York corporation does not at all alter the right both of the defendant to make the contract of borrowing and of the corporation in New York to make the contract of lending, according to its capacities in that State. The law of New York is the *lex loci contractus* in such cases and not that of the State where the borrower resides. That is both the business and the legal status of the transaction. It is only a question of how the parties shall get together to make their contract. It seems to me quite preposterous to say, as was suggested in the argument, that the borrower must physically leave the State of Tennessee and be physically present in the State of New York in order to make such a contract valid. It seems to be agreed by the defendant's counsel that if such physical presence in New York had occurred, this contract could be enforced. It is decided in Allgeyer's case that it can be enforced if the contract is made through the agency of the mails, that is to say, through the functions of the postmasters.

I suppose it would be agreed that if the defendant had
138 made the same contract through the agency of the express company that it would not have been illegal; or if he had put a messenger on the cars and sent him with a power of attorney to the city of New York, it would not have been illegal. Now why is it any more illegal to negotiate through persons in Tennessee who are willing to take the burden of attending to the details and transmitting their correspondence through the mails? For my part I do not see any distinction that can be fairly drawn, upon the circumstances, between the two cases.

We have, then, the broad principle, that a contract of borrowing and lending to be performed in the State of New York is the doing of that business within the State of New York, and not within the State of Tennessee, no matter how or what agencies are used for the purpose, and no matter what punishments may be inflicted upon those who dare to accept such agencies within the State of Tennessee.

And, moreover, we have in the Allgeyer case the broad principle that the right of the citizen of Tennessee to make such a contract of borrowing and of the New York corporation, such contract of lend-

ing, cannot be prohibited by the legislature of the State of Tennessee; and it is a misapplication of the power of the State of Tennessee over foreign corporations to assume that it can exercise any such prohibitions upon the freedom of contracts. The whole argument in behalf of this defense, proceeds upon the false assumption, in my judgment, that it was a contract made within the State of Tennessee.

It may be that this will very much narrow and limit the operation of this act of Tennessee, but I cannot see that that is any objection to the ruling here made. It may be that if the foreign corporations can thus "do business" in Tennessee, that we emasculate the power of the State of Tennessee to prevent their "doing business" in that State; but all this is a mere play upon the words, as the only effect of the ruling is to confine the power of the State to that class of prohibitions which prevent the foreign companies from becoming, *pro hac*, Tennessee corporations. That is the privilege given them by the original statute, and all the later statutes that if they will comply with their provisions they shall in effect, become domestic corporations. Indeed the conception of the original statute is one of encouragement and indulgence, and not prohibition; and the fallacy of the defense is that unless they become domestic corporations they shall not be allowed to make contracts with the citizens of Tennessee at all. How far they
139 may go in that direction we need not decide, but we have now the authority of the Supreme Court of the United States for saying that the legislature cannot go to the extent of prohibiting the making of a contract to be performed in the State of New York. There is no anomaly in this position, for, in the former opinion upon this question I cited the case of a Scottish railroad company which built its tracks within the territory of England, ran its traffic trains every day over that territory, kept its station-houses and station agents there, and yet that was held not to be "doing business" within the territory of England. Ceasar *v.* Cappell, *supra*. Hazleton *v.* Miss. Valley Ins. Co., 55 Fed. R., 743, 750.

Reference has been made in the argument to a Tennessee process act, chap. 226, of March 29, 1887, defining, for the purpose of serving process in suits brought against foreign corporations in Tennessee, what is to be, in the purview of that act, held to be "doing business" within the State. That is a special statutory definition for a special purpose and cannot be perverted to the purposes of an interpretation of another act where only a similar phraseology is used for an entirely different purpose. The truth is this phrase "doing business" within the State or "engaged in business" within the State is of such an indefinite and uncertain meaning, so vague and ambiguous, so elastic in its quality, that an act of the legislature which uses it without defining it is almost nugatory for want of certainty as to its meaning; and following the well-known and cardinal rules of construction such phraseology will not be construed by the courts to prohibit harmless contracts, or to secure formidable forfeitures upon the mere literalism of the words used. If one should undertake to define the phrase by specific or particu-

lar designations of the things prohibited, he might be expected to encounter difficulties in doing what penal acts should do in respect of explicit definitions of the offenses created; and as well some lack of power to extend the prohibitions beyond the territorial limits of the State. It is not possible to build a Chinese wall around a State, so that a citizen of it shall make no contracts with a foreign corporation except by permission of the State. The Allgeyer case settles that the mail at least will break through such a prohibitory contrivance.

The defense of usury is untenable. The contract is not usurious under the laws of the State of New York, and in that respect the case certainly is governed by the above-cited case of Poineer Savings Co. *v.* Cannon, 96 Tenn., 599, which holds that the usury
140 laws of Tennessee can have no extraterritorial effect. It has always seemed to me that that case also is almost a direct judgment in favor of the ruling here that this was a New York contract. It decided under very similar circumstances that it was a Minnesota contract and therefore not subject to the usury penalties of the Tennessee statutes. If it was a Minnesota contract for the purposes of usury it was a Minnesota contract for the purposes of the prohibitions of the act 1891.

This view of the case makes it unnecessary to consider the contention of the plaintiff that the defendant is estopped to contest the validity of the contract, upon the ground that he is himself *particeps criminis* and acting in violation of whatever State law there may have been; that he is taking advantage of his own wrong and his own turpitude as a violation of the statute as a defense to a debt voluntarily contracted and for which he has received full consideration. Also, upon the ground that having received and used plaintiff's money with full knowledge, necessarily implied, if not actually existing, of the plaintiff's alleged incapacity to contract in Tennessee, he is estopped to set up that incapacity as a defense upon much the same ground that one who deals with a corporation is estopped to deny the corporate character of the party with whom he deals. And, lastly, that the defendant was himself a member of this company at the time the act was passed, at the time he solicited the loan and at the time he made the contract; that it was a mutual company for which he is as much responsible as the other members and therefore he will not be allowed to set up that its contract was illegal and void, but must leave it to the State to enforce whatever penalties and forfeitures may arise to him and his fellows because of his own illegal conduct, in joining a mutual company acting in the State in violation of the law, or what is the same thing remaining in the company after the act was passed.

It is possible that this is a good defense, but we need not decide the point. Gold Mining Co. *v.* National, etc., Bank, 96 U. S., 640, was a case where a defendant sued by a national bank which had loaned him money was not allowed to plead as a bar that the bank had violated the act of Congress in lending a larger amount of its capital stock than had been actually paid in. There the court says, " we do not think that public policy requires or that the act of Con-

gress intended that an excess of loans beyond the proportion specified should enable the borrower to avoid the payment of the money actually received by him."

141 In Cowell *v.* Springs Company, 100 U. S., 55, upon a breach of a condition in a deed that intoxicating liquors should not be manufactured or sold upon the premises, the grantee was not allowed to set up the invalidity of the title in defense of a suit to enforce the terms of the condition. In Williams *v.* Gideon, 7 Heisk. (Tenn.), 621, the principle is well settled that the creditor who has confirmed a fraudulent deed by receiving a benefit under it, or becoming a party to it is estopped from impeaching it. And there are many other cases holding that corporations acting *ultra vires* and making invalid contracts may nevertheless enforce them against persons who have received the benefit, upon the doctrine that they are estopped to deny the binding effect of that which they have done voluntarily and with full knowledge of the facts. Ohio R. R. Co. *v.* McCarthy, 96 U. S., 258; National Bank *v.* Matthews, 98 U. S., 621, where the court quotes with approval Mr. Sedgwick's statement that, "where it is a simple question of authority to contract arising either on a question of regularity of organization or of power conferred by the charter, the party who has had the benefit of an agreement cannot be permitted in an action founded upon it to question its validity. It would be in the highest degree inequitable and unjust to permit a defendant to repudiate a contract the benefit of which he retains." Sedg. Stat. & Con. Law, 73; Whitney Arms Co. *v.* Barlow, 53 N. Y., 626; Sherwood *v.* Alvis, 83 Ala., 115; Ray *v.* Home, etc., Co., 98 Ga., 132; Macon R'y Co. *v.* Georgia R. R. Co., 63 Ga., 103; Poock *v.* La Fayette B. & L. Ass'n, 71 Ind., 657; Pancost *v.* Travelers' Union, 97 Ind., 162; Steam Nav. Co. *v.* Reed, 17 Barbour, 378.

It must be conceded that this doctrine does not apply to contracts involving moral turpitude on the part of both contracting parties or those which have some infirmity that arises out of a violation of public policy and public law constituted and maintained for the safeguard of the public against dangers threatening the health, morals and safety of the people, but this power of regulating foreign corporations and the methods of doing their business within the State or prohibiting them from doing business within the State at all has no such foundation as that. The laws are purely administrative and more directory than mandatory in their character.

At all events, if there are any cases involving the State's power over foreign corporations to which the doctrine of estoppel does apply, this case must fall within that class.

142 What has been said about the acts of 1891 applicable to all foreign corporations is equally applicable to the special act relating to building and loan associations of March 28th, 1891, ch. 2, p. 12, Acts 1891. That act is purely directory in its provisions. It does not impose any penalties for its violation nor does it contain anything prohibiting the doing of business within the State without a compliance with its directions. Much less than the other acts can it be said to declare the contracts made by foreign building and

loan associations without compliance with it void or to forbid their enforcement in the State courts. Its 7th section prohibits the officers, directors or agents from soliciting subscriptions of stock in this State or selling or knowingly cause to be sold or issued to a resident of this State any stock of the association without having deposited the securities required with the State treasurer; and it also requires the agents to have a license for which, as always, a fee is charged, and it punishes violation of this provision by making it a misdemeanor. Some penalties are imposed upon domestic corporations for a violation of the directions requiring them to keep deposits with the treasurer but there is not one line, word or syllable of the whole act which makes the contracts void. However, since the act of March 17th, 1891, ch. 95, and the act of March 26th, 1891, ch. 122, in their terms apply to building & loan as well as to all other corporations, the whole legislation may be taken as standing together, *pari passu*, upon the same footing one with another, and, taken altogether, it may be said that contracts falling within the prohibitions are not enforceable by the State courts of Tennessee and perhaps not by the Federal courts sitting within the State, though, as before remarked, that may be doubtful. Yet, the fact remains, that a contract by any of these corporations to be performed in another State does not fall within the denunciations and prohibitions of the statute. These acts comprehend every foreign corporation whatever, and if they are to be construed and enforced in the manner suggested by this defense they would make void and non-enforceable every ordinary loan of money by a banking corporation in another State to a citizen of Tennessee carried on by a correspondence through the mails or through the agency of local banks and loan brokers as well as every other commercial contract which can possibly be conceived, made with foreign corporations. It is inconceivable that the legislature had any intention to give the statute such effect as that, and the true spirit and meaning of the act is in my judgment found in the fourth section of the act of March 26, 1891, ch. 122, and also of the original act of 1877, M. & V. Code, sec. 1994, as follows:

143 "SEC. 4. That when any corporation complies with the provisions of this act it shall then be to all intents and purposes a domestic corporation, and may sue and be sued in the courts of this State, and subject to the jurisdiction of the courts of this State just as if it were created under the laws of this State." This means that foreign corporations may have the privilege of becoming Tennessee corporations by compliance with these statutes, and their domestication was the real purpose of all the acts. Foreign corporations that desire such domestication must comply with the provisions of these statutes, and if they carry on their business in the same manner that domestic corporations do and make their contracts to be performed within the State of Tennessee without compliance with these acts then they are within the pains and penalties of the statutes. But if they confine their business to their own home places, make their contracts there, to be performed there, as was done in this case, they are not within the pains and penalties of the acts and such contracts are not affected by them. As to such

contracts it is not within the power of the State to discharge or suspend their obligations. It may be within the power of the State by judicial construction of the act to close the courts of Tennessee to their enforcement, but they cannot close the courts of the United States to suitors who resort to those tribunals for enforcement of the contract. Says Mr. Justice Clifford, in Greene *v.* Commercial, etc., Bank, 3 Cliff., 494 (Fed. cas. No. 5755):

"Doubts may at one time have existed upon the subject, but it is now well settled that a State law cannot discharge or suspend the obligation of a contract made in another State if it was legal where it was made and was a contract with a citizen of another State, not even if it was to be performed in the State whose law is invoked to defeat the remedy."

He cites Baldwin *v.* Bank of Newbury, 1 Wall., 236; Sidam *v.* Broadnax, 14 Pet., 74; Union Bank *v.* Jolly, 18 How., 503; Watson *v.* Tarpley, *id.*, 520; Hight *v.* Stone, 20 How., 175; Demerit *v.* Exchange Bank, 1 Brunner Cas., 598; Fed. cas. No. 3780; Hunt *v.* Danforth, 2 Curtis, 592; Fed. cas. No. 6887, in which Mr. Justice Curtis remarks—"No State law can *propri- vigore*, deprive this court of jurisdiction conferred by the Constitution and laws of the United States," applying the doctrine to the effect of the insolvency laws of a State. See also Cowles *v.* Mercer Co., 7 Wall., 118; So. Pac. R'y Co. *v.* Denton, 146 U. S., 202.

144 It is sufficient to refer to the case of Cæsar *v.* Cappell, 83 F. R., 403, to the judgment of the court upon the effect of the filing of the charter with the secretary of state and the abstract thereof on Aug. 11, 1893, subsequently to the making of the contract and prior to the passage of the curative act of May 10, 1895. We there held that a compliance with the statute prior to act of 1895 was, in itself a sufficient filing which removed whatever infirmity there was in the contract, and therefore it might be enforced by the courts without regard to the act of 1895 subsequently passed. It was there said:

"The infirmity which existed before that time was that the courts of Tennessee, State and Federal, if you please, would not enforce a contract made in disobedience of the statute, but whenever that disobedience was removed and the parties complied with the conditions there was no longer any substantial reason why the courts should not enforce it.

Any reason that might be assigned for not enforcing it would be neither within the mischiefs to be remedied by the statute nor within the enforcement of any policy declared by it, but purely and entirely sentimental; the sentiment being that the contract having been originally made in disrespect of the statute, should be forever disfavored by the courts and repelled from their precincts, until the legislature had granted a statutory pardon. We think it will be found that courts do not proceed upon any such theory unless the infirmity inheres in the vicious, immoral or criminal nature of the act itself."

This still seems to me quite a substantial answer to the defense that has been set up in this suit.

The result is that the plaintiff is entitled to a decree for the collection of its debt and the foreclosure of its mortgage, and the usual decree for that purpose will be drawn and entered.

Decree accordingly.

Circuit Court of the United States, Western District of Tennessee.

EASTERN BUILDING & LOAN ASSOC'N
vs
H. L. BEDFORD and L. M. BEDFORD. } No. 487.

Assignment of Errors. Filed June 4, 1898.

145 Assignments of error by and on behalf of H. L. Bedford and L. M. Bedford, defendants and appellants.

The said above-named defendants and appellants, H. L. Bedford and L. M. Bedford, come and assign the following as errors in the rendition of the decree of June 4th, 1898:

1st. The court erred in rendering a decree against the defendants and each of them for any sum whatever.

2d. The court erred in rendering a decree against the defendants and each of them for any sum for costs of this cause and for making the same a charge against the property or its proceeds.

3d. The court erred in not holding that the Eastern Building & Loan Association of Syracuse, N. Y., had not complied with the acts of the legislature of the State of Tennessee, viz: Act of March 19th, 1877, chapter 31 of Acts of 1877, act of March 10, 1891, chapter 95 of Acts of 1891, act of March 21, 1891, chapter 122 of Acts of 1891, when the contract was made, and in not holding that such contract was void and unenforceable. The court should have held that such contract was void or unenforceable.

4th. The court erred in not holding that the Eastern Building & Loan Association of Syracuse, New York, had never complied with the act of the legislature of the State of Tennessee of March 26, 1891, being chapter 2 of said Acts of 1891, and in not holding that the contract was void and unenforceable. The court should have held that such contract was void or unenforceable.

5th. The court erred in holding that the contract sued on was a New York contract and not a Tennessee contract. The court should have held that the contract was a Tennessee contract and not a New York contract.

6th. If the contract sued on be considered as a New York contract then the court erred in holding it was valid and enforceable. The court should have held, even if it was a New York contract, that it was made by plaintiff in evasion of the Tennessee statutes set forth of Nos. 3 and 4 of this assignment of errors and was void or unenforceable in any court sitting in Tennessee, State or Federal.

7th. The court erred in holding that the statutes of the State of Tennessee referred to in Nos. 3 and 4 of this assignment of errors, if they applied to the contract in question, were in conflict with the Constitution of the United States or any part thereof. The court

should have held that no such conflict existed and that the statutes referred to were valid and covered the transactions in question, and that the contract was void or unenforceable.

146 8th. The court erred in not holding that the act of the legislature of the State of Tennessee of 1887, being chapter 226 of said Acts of 1887, defined what was doing business in the State of Tennessee by foreign corporations, and in not holding that plaintiff, in its transactions in question, was doing business in Tennessee in the sense of said statute without complying with the laws of Tennessee, and that its contract was void or unenforceable.

9th. The court erred in not holding that the plaintiff was and is a New York corporation, and that the law of the State of New York required corporations of other States than New York having transactions with persons in that State to comply with the regulations of the New York statutes on such subjects, and where such compliance was not had, that contracts made were either void or unenforceable in New York. Such being the fact, the court should have held similar requirements as to New York corporations existed in Tennessee, and that the contract was void or unenforceable.

10th. If the contract was not wholly void and was enforceable to any extent in Tennessee, then the court was in error in not holding that the same was usurious. The court should have held that the charging of a fixed premium for the loan made it usurious to that extent, and should have further held that when Bedford was made to withdraw his shares in the plaintiff company that he lost all interest in any profits of the company and agreed to pay a fixed amount in a fixed time, and that thereby the said transaction became usurious and all usury should be eliminated and he be credited on the claim with the full amounts paid by him. The court should have held that this was the law of the State of Tennessee as well as the law of the State of New York, and that if it were not the law of New York that it was the law of the State of Tennessee, applicable to this case, and that plaintiff, as a foreign corporation, had only the rights which a Tennessee corporation would have.

11th. The court erred in holding that defendants and appellants were estopped to plead the invalidity of the contracts sued on.

R. M. HEATH,
W. C. McLEAN,
Attorneys for H. L. Bedford and L. M. Bedford,
Defendants and Appellants.

147 Circuit Court of the United States, Western District of Tennessee, at Memphis.

EASTERN BUILDING & LOAN ASS'N
vs.
H. L. BEDFORD & LOUISA M. BEDFORD. } No. 487.

Prayer for Appeal. Filed June 4, 1898.

To the judges of said court:

The above-named H. L. Bedford and Louisa M. Bedford, conceiving themselves aggrieved by the decree entered herein on the 4th day of June, 1898, do hereby appeal from said decree to the United States circuit court of appeals at Cincinnati, Ohio, for the sixth circuit, and pray that this appeal be allowed and be made returnable in not exceeding thirty days from the date of the signing of the citation and that a transcript of the record and proceedings and papers upon which said decree was made, duly authenticated, may be sent to the United States circuit court of appeals at Cincinnati, Ohio, for the sixth circuit.

R. M. HEATH,
W. C. McLEAN,
Attorneys for H. L. and L. M. Bedford, Defendants and Appellants.

In the Circuit Court of the United States, Western District of Tennessee, Western Division.

EASTERN BUILDING & LOAN ASSOCIATION
vs.
H. L. BEDFORD & LOU M. BEDFORD. } No. 487.

Supersedeas Bond. Filed June 4, 1898.

Know all men by these presents, that we Hugh L. Bedford and Lou M. Bedford, as principals, and William C. McLean, as surety, are hereby held and firmly bound unto said Eastern Building & Loan Association in the full and just sum of ten hundred dollars, lawful money of the United States, to be paid to the said Eastern Building & Loan Association, for the payment of which well and truly to be made, we hereby bind ourselves jointly and sev-
148 erally, and our joint and several heirs, executors and administrators by these presents.

Signed by us, sealed with our seals, and dated at Memphis, Tennessee, this fourth day of June, A. D. 1898.

Whereas, the above-named principal has prosecuted an appeal to the United States circuit court of appeals for the sixth judicial circuit, holden at Cincinnati, in the State of Ohio, to reverse the decree rendered in the above-entitled suit against said principal by the circuit court of the United States for the western division of the western district of Tennessee.

Now, therefore, the condition of the foregoing obligation is such

that if the above-named principal shall prosecute his said appeal to effect, and answer all costs and damages if he fail to make his plea and the said appeal good, then this obligation shall be void, otherwise the same shall remain in full force and virtue.

HUGH L. BEDFORD, [SEAL.]
LOU M. BEDFORD, [SEAL.]
By R. M. HEATH, *Solicitor.* [SEAL.]
WM. C. McLEAN. [SEAL.]

Signed, sealed, delivered, taken and acknowledged before me at Memphis, Tennessee, this 4th day of June, A. D. 1898.

JOHN B. CLOUGH,
Clerk of said U. S. Circuit Court.

Approved at Memphis, Tennessee, on the day of date of the said bond.

E. S. HAMMOND,
United States District Judge.

UNITED STATES OF AMERICA, }
Western Division of the Western District of Tennessee. }

In the Circuit Court of the United States within and for the Western Division of the Western District of Tennessee, in the Sixth Judicial Circuit Thereof.

Proceedings had in said court at a regular term thereof, begun and held for its May term, A. D. 1898, at the United States court-house in the city of Memphis, in said district, on, to wit, the fourth day of June, A. D. 1898, in the following cause, to wit:

149 THE EASTERN BUILDING & LOAN ASSOCIATION, Plaintiff, v. H. L. BEDFORD, LOU M. BEDFORD, Defendants. } No. 487.

And now come the said defendants herein, by their solicitors, and file in this cause their petition for an appeal from the decree heretofore entered herein against them on this day, to the United States circuit court of appeals for the sixth judicial circuit, holden at Cincinnati, Ohio, in said circuit; and for satisfactory reasons to the court appearing the prayer of the said petition is hereby granted and the appeal so prayed for allowed, the said defendants having this day filed herein their assignments of error as prescribed by law and the rules of said circuit court of appeals, and having this day in such behalf made and executed to the said complainant their appeal bond as required by law, which said appeal bond has been duly approved by the presiding judge of this court.

No. 487. Circuit court of the United States, western district of Tennessee. Eastern Building & Loan Ass'n *vs.* H. L. Bedford *et al.* Order of court. Entered and filed 4 day of June, A. D. 1898. John B. Clough, clerk.

In the United States Circuit Court of Appeals for the Sixth Judicial Circuit, Cincinnati, Ohio.

EASTERN BUILDING & LOAN ASSOCIATION
vs.
H. L. BEDFORD & L. M. BEDFORD. } No. 487. Citation.

To the Eastern Building & Loan Association, Greeting:

You are hereby cited and admonished to be and appear before the United States circuit court of appeals for the sixth judicial circuit, at a session of said court to be held in the city of Cincinnati, in the State of Ohio, in said circuit, on the second day of July, A. D. 1898, pursuant to an appeal granted by the circuit court of the United States for the western division of the western district
150 of Tennessee, wherein H. L. Bedford and Lou M. Bedford, his wife, are plaintiffs in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said appeal mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this 4th day of June, A. D. 1898, and of the Independence of the United States the 122d year.

E. S. HAMMOND, [SEAL.]
U. S. District Judge for the Western District of Tennessee.

Acknowledgment of Service.

At Memphis, Tennessee, on this 25th day of June, A. D. 1898, service of the within citation is hereby duly acknowledged.

BUCHANAN & MINOR,
Solicitors for said The Eastern Building & Loan Association.

THE UNITED STATES OF AMERICA, }
Sixth Judicial Circuit, Western District of Tennessee. }

I, John B. Clough, clerk of the circuit court of the United States, for the western division of said western district of Tennessee, do hereby certify that the papers hereto attached, are full, true, perfect and correct copies of the originals and of the entire record and proceedings (with the original citation) in said court as the same now appears of record and upon the files in my office, in the following cause, to wit:

THE EASTERN BUILDING & LOAN ASSOCIATION OF SYRACUSE, N. Y.,
vs.
H. L. BEDFORD, LOU M. BEDFORD. } No. 487.

In testimony whereof, I have hereunto written my name and affixed the seal of said court, at my office in the city of Memphis, Tennessee, this 25th day of June, A. D. 1898, and of the Independence of the United States the 122d year.

[SEAL.] JOHN B. CLOUGH, *Clerk.*

151 *Authentication.*

I, E. S. Hammond, a judge of said court, do hereby certify that John B. Clough, whose genuine signature appears to the foregoing certificate is, and was at the date of the same, clerk of said court, and that his attestation is in due form.

E. S. HAMMOND,
Judge of the District Courts of the United States for the District Aforesaid.

No. 487. Circuit court of the United States, western district of Tennessee. Eastern Building & Loan Association of Syracuse, New York, *vs.* L. H. Bedford, Lou M. Bedford.

152 And afterwards, to wit, on July 6th, 1898, præcipe for appearance was filed in said cause, which is in the words and figures as follows:

United States Circuit Court of Appeals for the Sixth Circuit, October Term, 1897.

H. L. BEDFORD and WIFE
v.
EASTERN BUILDING & LOAN ASSOCIATION. } No. 637.

To the clerk of said court:

Please enter my appearance as counsel for the appellants.

ROBERT M. HEATH.
WM. C. McLEAN.

And afterwards, to wit, on March 14th, 1899, and entry was made upon the journal of said court, which reads and is as follows:

United States Circuit Court of Appeals for the Sixth Circuit.

H. L. BEDFORD and WIFE
v.
EASTERN BUILDING & LOAN ASSOCIATION.

153 This cause is argued on behalf of appellants in part by Mr. W. C. McLean, and the further hearing of the cause continued until tomorrow at 9.30 a. m.

And afterwards, to wit, on March 15th, 1899, an entry was made upon the journal of said court in said cause, which is in the words and figures as follows:

United States Circuit Court of Appeals for the Sixth Circuit.

H. L. BEDFORD and WIFE
v.
EASTERN BUILDING & LOAN ASSOCIATION.

This cause is further argued on behalf of the appellants by W. C. McLean and R. M. Heath, and on behalf of the appellee by Mr. H. D. Miner, and is submitted.

And afterwards, to wit, on July 5th, 1899, an order was entered in said cause, which reads and is as follows:

United States Circuit Court of Appeals for the Sixth Circuit.

H. L. BEDFORD and WIFE
v.
EASTERN BUILDING & LOAN ASSOCIATION. } # 637.

It is ordered by the court that this cause be certified to the Supreme Court of the United States.

154 And afterwards, to wit, on October 3rd, a copy of the following certificate was sent to the Supreme Court of the United States, which reads and is as follows:

Certificate.

155 United States Circuit Court of Appeals, Sixth Circuit.

H. M. BEDFORD and LOU M. BEDFORD, His Wife,
v.
EASTERN BUILDING AND LOAN ASSOCIATION OF SYRACUSE, N. Y. } No. 637.

Appeal from the United States circuit court for the western division of Tennessee.

Submitted March 15, 1899; decided July 5, 1899.

Before Taft and Lurton, circuit judges, and Thompson, district judge.

The Eastern Building and Loan Association of Syracuse, N. Y., is a corporation organized under the laws of the State of New York for the purpose and with the power of conducting a general building association business in New York and other States. Its plan of organization is similar to that generally adopted by such associations. Subscribers to its stock pay $1 initiation fee for each share of $100 and 75 cents per month as dues on each share and certain fines on default, and when the whole amount of dues and dividends paid in amount to $100, the holder is entitled to withdraw the same. Borrowing members receive par value of their shares in advance and secure their compliance with requirements as to dues, fines and

interest by mortgage or otherwise. Prior to March 26, 1891, the association had a soliciting agent in Memphis, Tennessee, whose duty it was to solicit persons to become members of the association and to subscribe to its stock. The agent had no authority to accept applications for membership or subscriptions for stock but only the authority to transmit them by mail to the office of the company in Syracuse, New York, where they were accepted or rejected by the board of directors of the association.

156 Three months after a person had subscribed for stock, and the stock had been issued to him, he was, by the by-laws of the association, permitted to apply for an advance of the nominal par value of his shares or, in effect, a loan. This application was forwarded through the soliciting agent to the company at Syracuse together with the certificate of stock, already issued, as a pledge and a statement of the value of the property which it was proposed to mortgage to secure the loan. The application was accompanied by a recommendation of what was called "the local board" in regard to the wisdom of the loan. The local board consisted of certain stockholders of the association living at the applicant's place of residence who had been elected by all the resident stockholders, and whose duty it was to advise the association at Syracuse concerning the value of the property offered and the character of the applicant. The local board had officers, one of whom was a treasurer through whom members might, if they desired, forward payments due to the association at Syracuse, but the by-laws stated that in so doing the local treasurer was acting as agent for the stockholders and not for the association. Another by-law provided that all payments should be made to the secretary of the association at the home office in registered letter, express or money order or drafts.

On the second day of January, A. D. 1891, H. L. Bedford, a resident and citizen of Shelby county, Tennessee, made the following application to the association which he delivered to its soliciting agent at Memphis to be forwarded to Syracuse:

O K. Sup't.	Cashier.	Stock.	A. F. 1, 26, '91. Recorded.	Indexed.	Filed.	Mailed.

46 shares. Number 4773.

Application for Shares in the Eastern Building and Loan Association of Syracuse, N. Y.

Agent, J. H. T. Martin.

I, H. L. Bedford, of Bailey, county of Shelby, State of Tennessee, No. of street or P. O. box —; occupation, farmer; hereby apply for membership in the Eastern Building and Loan Association of Syracuse, Onondaga county, New York, and subscribe for 46 shares of installment stock.

157 I hereby agree to abide by all the terms, conditions and by-laws contained or referred to in the certificate of shares, and will also comply with all the rules and regulations of said association, and do also hereby, in order to facilitate the transaction of business of the Eastern Building and Loan Association of Syracuse, N. Y., make, constitute and appoint the secretary of said association for me, in my name, place and stead, to appear and vote as my proxy upon any and all shares of stock at any time held by me, or standing in my name in said association during my absence, at any and all meetings of stockholders or directors and upon any and all matters which may properly come before any such meetings and attorneys, one or more under him, from time to time in writing to appoint, hereby authorizing, ratifying and confirming all that any said attorney, or his substitute, may do, or cause to be done as such proxy by virtue hereof. This proxy is not in any manner to affect my right to vote on all such stock whenever I am personally present at any stockholders' meeting.

In witness whereof I have hereunto set my hand and affixed my seal this 2d day of Jan'y, A. D. 1891.

Signature of applicant, H. L. BEDFORD. [SEAL.]

H. B. MARTIN, *Witness.*

The price of stock must accompany this application.

Endorsed.

Instructions to Agents.

This application should always be written in ink. All blank places should be filled correctly and plain to avoid any chance of error in the home office. Be particularly careful to have the name of applicant written plain and spelled correctly, and where there appears any possible chance for misreading any word. Agents should use the space at the bottom of application for explanation. The admission fee must accompany the application before the stock can be written at the home office.

Send certificate of shares to:

Name, —— ——.

P. O., ——.

County, —— ; State, ——.

On the 2d of February, 1891, the certificate of stock was issued by the association and sent to its soliciting agent at Memphis, who, a few days later, handed it to Bedford. The certificate was in the words following:

Series No. B 2. Maturing August 1st, 1897. Eastern Building and Loan Association of Syracuse, N. Y.

Certificate number 4773; number of shares, 46; amount, $4,600.

158 This certifies that H. L. Bedford, of Bailey, county of Shelby and State of Tennessee, is hereby constituted a share-

holder of the Eastern Building and Loan Association of Syracuse, New York, incorporated under the laws of the State of New York, and holds forty-six shares therein of one hundred dollars each, and in consideration of the membership fee, together with agreement and statements contained in the application for membership in the association, and full compliance with the terms, conditions and by-laws printed on the front and back of this certificate, which are hereby referred to and made a part of this contract, and the said Eastern Building and Loan Association of Syracuse, New York, agree to pay said shareholder or his heirs, executors, administrators or assigns the sum of one hundred dollars for each of said shares at the end of seventy-eight months from the date hereof or in case of his death prior to the expiration of seventy-eight months, the association will pay the sum of all monthly installments paid on this certificate with interest at 6 per cent. per annum, payable in the manner and upon the conditions set forth in said terms, conditions and by-laws hereto attached. All payments under this certificate are payable at home office of the association at Syracuse, New York within sixty days after the acceptance and approval of satisfactory proofs. This certificate of shares is issued to and accepted by the holder thereof upon the following express terms and conditions:

First. The shareholder agrees to pay or cause to be paid, a monthly installment of seventy-five cents on each share named in this contract, the same to be paid on or before the last Saturday of each month until such share matures or is withdrawn.

Second. If the shareholder shall fail to pay or cause to be paid any monthly installments on or before the last Saturday of each month, he shall pay a fine of ten cents per share for each and every month the payment may be in arrears.

Third. Stock in this association is non-forfeitable; but if a monthly payment on any share becomes past due and payable for a period of six months or more, such share shall be sold at auction for the purpose of paying the arrearages. The proceeds of the sale shall first be used to pay all back monthly payments and fines; the balance remaining after paying all accrued fines and monthly payments shall be paid to the member in whose name the stock stands at the time of sale. If the stock brings no more than enough to pay the accrued fines and monthly payments it shall be bid in by the association and canceled, and the amount standing to the credit thereof in the loan fund shall be divided among the other shares as profits.

Fourth. Members may withdraw their monthly installments at any time by first giving thirty days' notice, and will receive 6 per cent. annual interest on all shares of six months' standing
159 and up to two years; the third year's 7 per cent.; any time after the third year and before maturity 8 per cent.

Fifth. If a shareholder dies his personal representative may withdraw his shares at any time or continue on to maturity.

Sixth. At stated periods the profits arising from interest, premi-

ums, fines and other sources, shall be apportioned among the shares in good standing.

Seventh. All payments must be paid to an authorized agent, or sent to the secretary at the home office by draft, express or money order, or registered letter. Individual drafts or checks not receivable.

Eighth. The association reserves the right at any time to make an investigation in all cases prior to the approval of claims.

Ninth. The by-laws of this association, which are attached to and indorsed hereon, are a part of this contract and such by-laws and this certificate are to be construed together as part of the contract between the association and the shareholder.

Tenth. No shares shall be assignable or transferable on the books of the association, except by the shareholder paying a transfer fee of two dollars for entering the same, and upon consent of the association, indorsed thereon by the secretary after all dues and claims on the same have been paid.

Eleventh. It is agreed by all shareholders of this association that desire loans, that all money in the loan fund shall be sold at a uniform rate of ten per cent., bid as premiums on all loans.

Twelfth. No shareholder shall have any claim to any interest in the affairs, assets or funds of this association, nor the control of them, except as above specifically set forth, and assumes no further liability of any kind whatsoever except as hereafter described.

Thirteenth. In every case where this contract shall cease and determine, or become null and void, then all payments made thereon shall become forfeited to the association.

Fourteenth. Any action brought against this association shall be commenced within six months after filing proofs, and in the county of Onondaga, and State of New York.

Fifteenth. No agent has authority to change this contract in any way, and the association assumes no obligation for any statements not contained in its printed literature.

Given under the seal of said association at Syracuse, New York, the second day of Feb'y, A. D. 1891.

H. H. LOOMIS, *President.*

[L. S.] JNO. J. W. REYNOLDS,
Secretary and Gen'l Manager.

160 Attached to this were the by-laws of which only the following are deemed material:

Article I.

SECTION 3. The principal place of business of this association shall be located at Syracuse, N. Y., but the branches or agencies may be located and business done in any part of the State of New York, or in any other State or Territory of the United States where no legal prohibition exists, by authority of the board of directors, to be evidenced by a vote of a majority of the board, and spread upon its records.

Article IV.

SECTION 1. The annual meeting of the stockholders shall be held at the home office of the association on the second Monday of May of each year commencing with the year 1891, between 2 and 4 o'clock p. m., of which due notice shall be given according to law.

Article XIX.

Contract of members.

SECTION 1. The terms and conditions expressed in the certificate of stock, in connection with the application for membership and the by-laws of the association, form the contract between the association and each shareholder therein.

SEC. 16. All remittances for advance, installments, premiums, monthly installments, fines and penalties, interest and premiums, and all other payments, shall be made to the secretary of the association at the home office, and in registered letter, express or money order or drafts. Individual checks shall not be received.

Article XVI.

Local boards.

SECTION 1. Whenever sufficient stock has been sold in any town to make it advisable the members residing in each town may organize a local board or branch of the association. The officers of the local organization shall consist of a board of from five to nine directors, from whose number shall be elected a president, secretary and treasurer (combined) and attorney; all of whom must be shareholders in the association; these officers shall hold office one year and until their successors are elected.

SEC. 2. The traveling agents of the association are given authority to appoint the first officers of the local board. Provided, however, that officers so appointed shall only hold office until the members of the local board meet and elect their successors.

SEC. 3. It shall be the duty of the officers of the local board to pass on all applications for loans which are received by the
161 association from members residing in the town where such local board is located, and to protect the interest of the association in all practicable ways.

SEC. 4. Members may, if they so desire, make monthly payments on stock to the local treasurer. But such local treasurer shall be deemed to be the agent of the members, and not of the association.

SEC. 5. As soon as the officers of the local board have been appointed or elected, and the names of such officers have been certified to the association by a traveling agent or by the local secretary, a local board charter shall be issued to such board.

SEC. 6. The president of the local board shall call a meeting thereof whenever three members shall request him so to do.

On the 20th of March, 1891, Bedford made an application for a preference for an advance which was forwarded through the same

soliciting agent to Syracuse. Bedford described in detail the real estate upon which he proposed to give the association a mortgage. This application was approved May 18, 1891, by the board of directors at Syracuse. Bedford then applied on June 20th for the loan in the letter following:

Application for an Advance.

To the board of directors of the Eastern Building and Loan Association of Syracuse, N. Y.

GENTLEMEN: At a regular meeting of your board, held May 18, 1891, having obtained the preference for an advance on forty-six shares of No. 4773 of your association, at a premium of ten per cent., I now respectfully request the advance be granted. I hereby agree to comply with the charter and by-laws of your association and all requirements defined by your committee of the board of directors.

H. L. BEDFORD, *Applicant.*

Witness:
J. H. T. MARTIN.

This letter was accompanied by a mortgage to the association, duly executed and acknowledged by Bedford and wife before a notary in Shelby county, Tennessee, of the land in that county previously tendered as security. The mortgage had been duly recorded in Shelby county.

The defeasance clause of the mortgage was as follows:

"This grant is intended as security for the payment of the sum of fifty-six hundred, eighty-three and $\frac{8}{100}$ dollars, the same being the principal, interest and premium of a loan from said association, which said loan was made pursuant to and accepted under the provisions of the by-laws of said association, and which said
162 by-laws have been read by the mortgagor, H. L. Bedford, and are made a part of this contract, which said loan is evidenced and secured to be paid by seventy-eight (78) certain promissory notes of even date herewith, executed by the said H. L. Bedford, payable to the said association at its office in Syracuse as follows: One of each of said notes to be paid on or before the last Saturday of each and every month until all of said seventy-eight notes are fully paid, together with the interest, and each of said notes after maturity at the rate of six (6) per cent per annum, payable semi-annually, until said notes are fully paid. And the said mortgagor, H. L. Bedford, for himself and his heirs, executors, administrators and assigns hereby covenants and agrees with the party of the second part, its successors and assigns to pay said principal, interest and premiums at maturity and the interest accruing on said notes after maturity and all fines and penalties that may be imposed pursuant to the provisions of the constitution and by-laws of said association, and also to keep and perform all promises and engagements made and entered into with said association according to the true intent and meaning of its by-laws and articles of association, and also to keep the buildings erected and to be erected upon said prem-

ises insured against loss or damage by fire in an amount and in such manner and in such company as shall be most satisfactory to the party of the second part, its successors or assigns, so that the loss or losses, if any, shall be payable to it or them, and from time to time when taken out issued on said premises, which policies shall contain the best and most approved form of mortgage clause. And at once to make due proofs in case of loss and do all other things required, deliver over to it or them all policies and renewals thereof by said policies, and also pay and discharge when due and payable all taxes, assessments, rates and other charges now or hereafter levied or assessed upon said premiums and remove all adverse claims, clouds and encumbrances, also that until full payment of the money hereby secured nothing shall be done or suffered whereby said premises shall be diminished in value or any of said policies of insurance affected or vitiated.

In case default shall be made in effecting such insurance or in paying, discharging or removing such taxes, assessments, rates, other charges, adverse claims, claims or encumbrances as aforesaid, it shall be lawful for said second party, its successors or assigns, to effect such insurance and pay such taxes, assessments, rates, other charges, adverse claims, choses or encumbrances and the amount so paid shall be a lien on said premises added to the amount secured by these presents and forthwith due and payable without demand, with interest, and may be collected in the same manner as the principal sum hereby secured. And it is hereby expressly agreed by and between the parties to these presents that if default be made in the payment of any one of said notes or any part thereof as herein provided or in case of waste or non-payment of the taxes, assessments or impositions on said premises, or in case of neglect or re-
163 fusal to keep the premises insured as herein provided or in case the improvements thereon shall not be kept in good condition or repair, or in case of a breach of any of the covenants or agreements contained herein, or in case of failure to duly observe and keep the by-laws of the said association and in either or any of such cases, the whole of the said principal sum, interest, premiums, fines, dues and costs, shall at once become due and payable at the option of said association, its successors or assigns and it shall be lawful for said association or its successors or assigns at any time thereafter to sell the said premises hereby granted, or any part thereof, in the manner prescribed by law and out of the moneys arising from such sale to retain the amount due and unpaid for principal, interest, premiums, fines, dues and costs thereof, taxes, assessments, impositions, insurance and other advances, together with the costs and charges of making such sale, and the overplus, if any there be, shall be paid by the party making such sale on demand to the said H. L. Bedford, or his heirs or assigns. And this controversy shall be void if full payment of the aforesaid moneys, with principal and interest, be made as hereinbefore specified, and if the aforesaid covenants and each of them be well and truly kept and performed as herein specified and provided."

The seventy notes were all of the same tenor, *mutatis mutandis*, as the following:

On or before the last Saturday of June, 1893, I promise to pay seventy-two and 86-100 dollars, $72 86-100, to the order of the Eastern Building and Loan Association at its office in Syracuse, N. Y. Value received. Bailey, Tenn., May 1, 1891.

H. L. BEDFORD.

The business of the association in Tennessee had been lawful down to March 26, 1891, when the following act was passed by the legislature of Tennessee:

CHAPTER 122.

An act to amend chapter 31 of the Acts of 1877, declaring the terms on which foreign corporations organized for mining or manufacturing purposes may carry on their business and purchase, hold, and convey real and personal property in this State, so as to make the provisions of said act apply to all foreign corporations that may desire to own property or to do business in this State.

SECTION 1. Be it enacted by the General Assembly of the State of Tennesssee, That chapter 31 of the Acts of 1877 be so amended and enlarged as that the provisions of said act shall apply to all corporations chartered or organized under the laws of other States or countries for any purpose whatsoever which may desire to do any kind of business in this State.

SECTION 2. Be it further enacted, That each and every corporation created or organized under or by virtue of any government other than that of this State, for any purpose whatever, de-
164 siring to own property or carry on business in this State of any kind or character, shall first file in the office of the secretary of the State a copy of its charter and cause an abstract of same to be recorded in the office of the register in each county in which such corporation desires or proposes to carry on its business or to acquire or own property, as now required by section 2 of chapter 31 of Acts of 1877.

SECTION 3. Be it further enacted, That it shall be unlawful for any foreign corporation to do or attempt to do any business or to own or to acquire any property in this State without having first complied with the provisions of this act, and a violation of this statute shall subject the offender to a fine of not less than $100 nor more than $500, at the discretion of the jury trying the case.

SECTION 4. Be it further enacted, That when a corporation complies with the provisions of this act it shall then be, to all intents and purposes, a domestic corporation, and may sue and be sued in the courts of this State, and subject to the jurisdiction of the courts of this State just as though it were created under the laws of this State.

SECTION 5. Be it further enacted, That when such corporation has no agent in this State upon whom process may be served by any person bringing suit against such corporation, then it may be pro-

ceeded against by an attachment to be levied upon any property owned by the corporation, and publication, as in other attachment cases. But for the plaintiff to obtain an attachment he, his agent or attorney, need only make oath of the justness of his claim, that the defendant is a corporation organized under this act, and that it has no agent in the county where the property sought to be attached is situated upon whom process can be served.

SECTION 6. Be it further enacted, That said chapter 31 of the Acts of 1877, except in so far as the same is amended, enlarged and extended by this act, be and the same is declared to be in full force.

SECTION 7. Be it further enacted, That this act take effect from and after its passage, the public welfare requiring it.

Passed March 21, 1891.

THOMAS R. MYERS,
Speaker of the House of Representatives.
W. C. DISMUKES,
Speaker of the Senate.

Approved March 26, 1891.

JOHN P. BUCHANAN, *Governor.*

Upon the same date an act was passed concerning building associations. The part thereof relating to foreign building associations was as follows: (Chapter 2 of the Acts of 1891.)

SEC. 3. Be it further enacted, That no building and loan association organized under the laws of any other State, Territory
165 or foreign government, shall do business in this State unless said association shall (deposit and continually thereafter) keep deposited in trust for all of its members and creditors, with some responsible trust company, or with some State officer of this or some other State of the United States, mortgages (or other securities) received by it in the usual course of its business amounting to not less than twenty-five thousand ($25,000) dollars nor more than fifty thousand ($50,000) dollars, at the discretion of the State treasurer. All of the personal obligations of its members taken in the ordinary course of business of such association and secured on first mortgage on real estate, all dividends and interest which may accrue on securities held in trust, as aforesaid, by the trust company or the State, as provided herein, and all dues or monthly payments which may become payable on stock pledged as security for loans, the mortgages for which are on deposit in accordance with the provisions of this act, may be collected and retained by the association depositing such securities or mortgages so long as such association remains solvent, and faithfully performs all contracts with its members. Any securities on deposit, as provided herein may from time to time, be withdrawn, if others of equal value are substituted therefor. Every building and loan association organized under the laws of any State, Territory or foreign government shall, before commencing to do business in this State,

First. File with the treasurer of this State a duly authenticated copy of its charter or articles of incorporation.

Second. File with the treasurer of this State the certificate of the proper State officer of another State or the president and treasurer of some responsible trust company certifying that it has on deposit securities, not less than $25,000, taken in the regular course of business as mentioned in this act, in trust for all the members and creditors of such building and loan association.

Third. File with the State treasurer a duly authenticated copy of a resolution adopted by the board of directors of such association stipulating and agreeing, that if any legal process affecting such association be served on said State treasurer, and a copy thereof be mailed, postage prepaid, by the party procuring the issuing of the same, or his attorney, to said association, addressed to its home office, then such service and mailing of such process shall have the same effect as personal service on said association of this State.

Fourth. Pay the State treasurer twenty-five ($25) dollars as fees for filing the papers mentioned in this section.

SECTION 7. Be it further enacted: No officer, director or agent of any foreign building and loan association shall, in this State, solicit subscriptions to the stock of such association, or sell, or knowingly cause to be sold or issued, to a resident of this State any stock of an association while said association has not on deposit securities as required by section 3 of this act, or before said association
166 has complied with all the provisions of this act. License to agents of such companies or associations shall be issued by the treasurer annually, on the first of January and said treasurer is authorized to collect from each agent for said license $2 fee. Any violation hereof shall be deemed a misdemeanor, and upon conviction shall be punished by a fine of not less than ten dollars or more than fifty dollars.

The association filed its charter with the secretary of state of Tennessee on the 11th day of August, 1893, and filed an abstract of the same in the office of the register of Shelby county on August 15, 1893. The association did not comply with the building association laws quoted above in any respect.

There is no evidence that the association solicited stock subscriptions after March 26, 1891, but it does appear that it made several loans of the same kind as the Bedford loan upon stock already subscribed for, after that date.

The supreme court of Tennessee has decided that notes and a mortgage executed under similar circumstances and made payable in Minnesota are Minnesota contracts, but that they are, nevertheless, void in Tennessee and cannot be enforced in the courts of Tennessee. United States Savings & Loan Company *v.* Miller, 47 Southwestern Rep., 17, affirmed on appeal by supreme court, December 18, 1897, without written opinion.

Bedford defaulted in his payments on the notes and the association filed a bill in equity in the circuit court of the United States for the western district of Tennessee to foreclose the mortgage and collect the amount due under his contract. The defendant, Bedford, answered, averring that the notes and mortgage were in vio-

lation of the above-quoted laws of Tennessee and were void and could not be enforced.

This court, being in doubt upon the questions thus raised, hereby certifies to the supreme court the following questions and respectfully requests answer to the same:

First question. Was the validity of the notes signed in Tennessee by the maker, manually delivered by him to the soliciting agent of the association at Memphis to be transmitted to the association at Syracuse for the acceptance of the association at that place and payable at Syracuse, to be determined by the laws of Tennessee or of New York?

Second question. Was the validity of the mortgage executed and delivered under the same circumstances to be determined by the validity of the note to which it was incident, or by the law
167 of the State where the land lay which the mortgage conveyed, and which upon default must be sold to pay the notes?

Third question. May a State by its laws forbidding the transaction of business within its borders annul the contracts of its citizens entered into and to be performed without the State, when those contracts are but the consummation of the inhibited business within the State, without an infraction of the 14th amendment to the Constitution of the United States?

Fourth question. Even if a State may by law refuse enforcement of such a contract in its courts, should a circuit court of the United States sitting in the State refuse to enforce it when jurisdiction over the parties exists by reason of their diverse citizenship?

(Signed) WM. H. TAFT,
HORACE H. LURTON,
A. C. THOMPSON,
Judges of the United States Circuit Court of Appeals for the Sixth Circuit, Sitting in said Case.

Oct. 3, 1899.

168 United States Circuit Court of Appeals for the Sixth Circuit.

I, Frank O. Loveland, clerk of the United States circuit court of appeals for the sixth circuit, do hereby certify that the foregoing is a true and correct copy of the record in the case of H. L. Bedford and wife *vs.* Eastern Building & Loan Association, No. 637, October term, 189–, as the same remains upon the files and records of said United States circuit court of appeals for the sixth circuit, and of the whole thereof.

Seal United States Circuit Court of Appeals, Sixth Circuit.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States circuit court of appeals for the sixth circuit, at the city of Cincinnati, Ohio, this twentieth day of January, 1900.

FRANK O. LOVELAND,
Clerk of the United States Circuit Court of Appeals for the Sixth Circuit.

169 UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the honorable the judges of the United States circuit court of appeals for the sixth circuit, Greeting:

Being informed that there is now pending before you a suit between H. M. Bedford and Lou M. Bedford, his wife, and Eastern Building and Loan Association of Syracuse, N. Y., which suit was removed into the said circuit court of appeals by virtue of an appeal from the circuit court of the United States for the western district of Tennessee, and we being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said circuit court of appeals and removed into the Supreme
170 Court of the United States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 29th day of December, in the year of our Lord one thousand eight hundred and ninety-nine.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

United States Circuit Court of Appeals for the Sixth Circuit.

In pursuance of the command of the within writ of certiorari I now herewith send, under my seal, the record and proceedings of the United States circuit court of appeals for the sixth circuit in the within-named case, H. L. Bedford and wife *vs.* The Eastern Building & Loan Association of Syracuse, as the same appears upon the files and records of this court.

Seal United States Circuit Court of Appeals, Sixth Circuit.

Witness my official signature and the seal of said court, at the city of Cincinnati, Ohio, this 23rd day of January, A. D. 1900, and in the one hundred and twenty-fourth year of the Independence of the United States of America.

FRANK O. LOVELAND,
Clerk of the United States Circuit Court of Appeals for the Sixth Circuit.

Costs due the United States circuit court of appeals for this transcript are $129.30, unpaid.

171 [Endorsed:] Supreme Court of the United States. No. 444, October term, 1899. H. M. Bedford and Lou M. Bedford, his wife, *vs.* Eastern Building & Loan Association. Writ of certiorari.

Endorsed on cover: File No., 17,558. Supreme Court U. S., October term, 1900. Term No., 153. H. L. Bedford and Lou M. Bedford, his wife, petitioners, *vs.* The Eastern Building and Loan Association of Syracuse, New York. Writ of certiorari & return. Filed January 31, 1900.

IN THE

Supreme Court of the United States.

DECEMBER TERM, 1899.

H. L. BEDFORD *et al.*
vs.
EASTERN BUILDING AND LOAN ASSOCIATION OF SYRACUSE, NEW YORK.
No. 444.

Petition for a writ of certiorari to require the Circuit Court of Appeals for the Sixth Circuit to certify to the Supreme Court of the United States the whole record in the above-entitled cause, for its review and determination, or in the event that such motion is not granted, for permission to file and use in this case the printed record used in the Circuit Court of Appeals, in addition to the certificate sent up by the said Circuit Court of Appeals.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petitioners, H. L. Bedford and Lou M. Bedford, his wife, respectfully show to this honorable court as follows:

First.

That your petitioners are citizens of the State of Tennessee.

Second.

That in a cause now pending between your said petitioners and the Eastern Building and Loan Association of Syracuse, State of New York, in the Circuit Court of Appeals for the Sixth Circuit, upon an appeal from the Circuit Court of the United States for the Western District of Tennessee, the judges of the said Court of Appeals have certified to this honorable court certain questions or propositions of law for instructions thereon, together with a statement of the facts as a basis for such questions or propositions of law.

Third.

Your petitioners represent to this honorable court that, in order to do justice to them, the case should be determined upon the whole record, and upon all the facts in the case, for the following reasons, to wit:

The statement of facts contained in the certificate of the United States Circuit Court of Appeals, taken in connection with the questions of law propounded by it, as worded, is defective and misleading. Various important facts which appear in the printed record of this cause are omitted from the statement of facts in the certificate, and such omission and the language used in the questions of law might cause your honors to suppose certain facts to have existed, and to have been decided by the United States Circuit Court of Appeals, when such was not really the case. This omission of facts from the certificate, and the peculiar language used in some of the questions of law, as petitioners submit, give, or may

give, a wrong coloring to this case, and prevent the case, as it really is, from being heard by your honors. Petitioners respectfully submit to your honors that the questions of law propounded in said certificate should be answered as applicable to the real facts of this case, and not as applicable to facts which do not exist, and which your honors, from the peculiar language of some of the questions of law propounded, might erroneously suppose to have existed and to have been decided by the Circuit Court of Appeals. Petitioners submit that the United States Circuit Court of Appeals did not, in fact, decide that certain facts existed in this case, as will be apparent if the whole record is before your honors. The whole record should be before your honors in order to determine what the questions of law propounded really mean, and to prevent a wrongful interpretation of said questions, and any erroneous view of the facts upon which the said questions are based. Petitioners submit further to your honors that they are entitled to a hearing upon the real facts of this case, if the United States Circuit Court of Appeals should have decided these facts erroneously.

The statement of facts in the certificate shows that the Eastern Building and Loan Association, a New York corporation, prior to March 26, 1891, had a soliciting agent in Memphis, Tennessee, whose "duty it was to solicit persons to become members of the association, and to subscribe to its stock," and that such agent transmitted all applications for such membership or stock in said association by mail to the association in Syracuse,

New York, where they were accepted or rejected by the Board of Directors. That three months after the issuance of stock to a subscriber "he was by the by-laws of the association permitted to apply" for an advance or loan, which application was likewise forwarded through the soliciting agent to the association at Syracuse, accompanied with the certificate of stock and a statement of value of the property proposed to be mortgaged, and also accompanied with the recommendation of the "local board" in regard to the wisdom of the proposed loan. That H. L. Bedford, of Shelby County, Tennessee, in the manner indicated above, on January 2, 1891, applied for shares in the Eastern Building and Loan Association, and a certificate of shares was issued to him February 2, 1891, and sent to him through said soliciting agent. That on March 20, 1891, H. L. Bedford "made an application for a preference for an advance, which was forwarded through the same soliciting agent to Syracuse." No copy of this application appears in the certificate of the Circuit Court of Appeals, but it is stated therein that "this application was approved May 18, 1891, by the Board of Directors at Syracuse." The certificate then shows that H. L. Bedford "applied on June 20 for the loan in the letter following," giving a copy of the "application for an advance." The certificate shows that this letter of June 20 was accompanied by a mortgage of land in Shelby County, Tennessee, executed and acknowledged by Bedford and wife in said county and State, and which mortgage had been recorded. Only the defeasance clause of said mortgage was given, and the dates

of said mortgage and of its acknowledgments and recordation do not appear in the certificate. The certificate showed H. L. Bedford executed 78 notes, all dated "Bailey, Tennessee, May 1st, 1891," and all payable on their face "to the order of the Eastern Building and Loan Association at its office in Syracuse, New York."

The certificate stated that "the business of the association in Tennessee had been lawful down to March 26, 1891," when two acts were passed by the Legislature of the State of Tennessee, being chapters 2 and 122, in regard to foreign corporations. The association did not comply with the requirements of chapter 122 until August 11, 1893, and August 15, 1893, and never, in any manner, complied with its requirements of the Act Chapter 2.

The certificate stated there was "no evidence that the association solicited stock subscriptions after March 26, 1891," but that it did appear it "made several loans of the same kind, as the Bedford loan, upon stock already subscribed for after that date." The certificate showed that the Supreme Court of Tennessee had decided that notes and mortgages similar to the ones in question, made payable in Minnesota, were Minnesota contracts, but were, nevertheless, void in Tennessee.

The judges of the United States Circuit Court of Appeals then requested an answer to various questions.

The first and third questions are as follows:

(First Question).—Was the validity of the notes signed in Tennessee by the maker manually delivered by him to the soliciting agent of the association at Memphis, to

be transmitted to the association at Syracuse, for the acceptance of the association at that place, and payable at Syracuse, to be determined by the laws of Tennessee or of New York?

(Third Question).—May a State by its laws, forbidding the transaction of business within its borders, annul the contracts of its citizens, to be entered into and to be performed without the State, when those contracts are but the consummation of the inhibited business within the State, without an infraction of the Fourteenth Amendment to the Constitution of the United States?

Petitioners submit to your honors that the said first and third questions, as worded, are misleading. Your honors might infer, from the language of the same, that the United States Circuit Court of Appeals decided that certain facts existed in this case, which petitioners submit did not really exist, and which said Circuit Court of Appeals did not really decide had so existed. Petitioners submit that the truthfulness of their contention as to this matter is apparent from the facts of this case, as disclosed in the printed record thereof in the United States Circuit Court of Appeals.

Petitioners state to your honors that it might be erroneously inferred from that portion of the "first question," saying, "to be transmitted to the association at Syracuse for the acceptance of the association at that place," and from that portion of the "third question," saying, "the contracts of its citizens entered into and to be performed without the State," that in the opinion of

the United States Circuit Court of Appeals, the contracts in question in this suit were the result of propositions made by petitioner H. L. Bedford, which were accepted by the Eastern Building and Loan Association in New York, and that such contracts were thereby closed in New York. Petitioners state to your honors that as a matter of fact, as disclosed by the original printed record in this case, the contracts in question were closed in Tennessee by the execution of the notes and the mortgage in Tennessee, according to the propositions, terms, and requirements of the Eastern Building and Loan Association. After the execution of the notes and mortgage in Tennessee, no acceptance of the same in New York was necessary to complete said contracts. The words " for the acceptance of the association at that place," in the first question, mean simply that after the notes and mortgage had been executed in Tennessee, as required by the association, they were delivered to its agent in Tennessee, who sent them on to the association, his principal, in New York. In like manner, the words " entered into," in the third question, mean simply that a contract was entered into, and do not signify that it was entered into in New York.

If the petitioners be mistaken in putting this construction upon the language of said first and third questions, then they respectfully submit that the United States Circuit Court of Appeals decided the facts of the case erroneously, and petitioners most respectfully ask that the printed record of the cause be inspected by your honors, so that the real facts of this case can be known and acted upon.

Petitioners state to your honors that the questions of law propounded by the United States Circuit Court of Appeals do not purport to contain therein any statement of facts. The statement of facts in the certificate is given separately from the questions of law, and the latter are based upon the former. The United States Circuit Court of Appeals does not say in its statement of facts in the certificate that the contracts in question were closed by the acceptance in New York, by the association, of the notes and mortgage which had been executed in Tennessee, and that it should not be inferred from the language of the first and third questions of law that the contracts were closed in New York, when the statement of facts in said certificate did not so show, and when the facts as disclosed by the original printed record show, that the contracts were closed in Tennessee by the execution of the notes and mortgage therein, and the delivery of the same to the agent of the association in Tennessee, who merely sent them on to the association in New York.

Petitioners respectfully submit to your honors that in answering the first question propounded by the United States Circuit Court of Appeals, the validity of the notes and mortgage should be determined by the laws of Tennessee, and not by the laws of New York, and, in either event, whether the contracts were closed in Tennessee by the execution of the notes and mortgage therein, or were closed in New York by the acceptance of the notes and mortgage by the association, after they had arrived in that State. In either event the notes and mortgage, as will be apparent from an inspection of the printed record in this

case, as used in the Circuit Court of Appeals, were the result of and parts of an illegal business carried on in Tennessee by the Eastern Building and Loan Association, and said contracts were void, and unenforceable in Tennessee. Petitioners, however, submit to your honors that the violation of Tennessee law was plainer and more palpable, and the attempted evasion of it by the Eastern Building and Loan Association more glaring, when the contracts were actually made and closed in Tennessee, in response to the requirements of said association, by the execution of the notes and mortgage in said State, which were afterwards merely forwarded to New York, and when such contracts were parts of a general business admittedly carried on by said association within said State of Tennessee.

Petitioners represent to your honors that the statement of facts in the certificate is defective, that many important facts disclosed by the record do not appear in said statement of facts, and that their absence and the defective wording of the questions of law propounded to your honors, as hereinbefore pointed out, tend to give a wrongful impression as to the real facts of the case.

Petitioners will now call your honors' attention to different facts, which appear in said original record, and which do not appear in said certificate or the statement of facts therein.

First.—The said certificate stated that it appeared that the association, after March 26, 1891, "made several loans of the same kind as the Bedford loan, upon stock already subscribed for."

Said certificate failed to show that the bill filed herein

by the Eastern Building and Loan Association (see original printed record, pages 1–8) set forth the transactions "with H. L. Bedford, giving the dates of the same, and that said bill alleged (Record, p. 2) that said association, "at the times hereinafter mentioned, was lawfully doing business in the State of Tennessee;" thus admitting, judicially, it was carrying on business in Tennessee after the passage of the Tennessee acts, and its transactions were not isolated transactions.

A stipulation of counsel appears in the printed record at pages 112 to 115. None of the facts set forth in this stipulation appears in the certificate of the Circuit Court of Appeals. This stipulation of counsel showed the general character of the business transacted by the Eastern Building and Loan Association in Tennessee, and that all of the loan business of the association in Tennessee was transacted exactly as the transactions with H. L. Bedford had occurred.

It thus appeared from the admission in the bill before quoted, and from this stipulation of counsel, that the Eastern Building and Loan Association was carrying on a general loan business in Tennessee, and that the methods or forms adopted by it, in this business, were to demand notes payable in New York. The question presented in this case upon the facts, as they appear in the printed record, is this: Can a foreign company, forbidden by Tennessee law to carry on business within its borders without complying with the preliminary requirements of such law, carry on such business in Tennessee and refuse to comply with the requirements of such law, and

evade or disregard that law, by merely taking notes payable outside of Tennessee, or by having notes executed in Tennessee sent out of that State to be accepted by the association carrying on the illegal business in Tennessee?

The statement of facts, in the certificate, is defective, because it does not show the general character of the business carried on in Tennessee by the association, but merely says it appears that the association "made several loans of the same kind as the Bedford loan upon stock, already subscribed for, after that date, March 26th, 1891." The stipulation of counsel, before referred to (see printed record, pages 112 to 115), shows that in carrying on this general loan business the Eastern Building and Loan Association had made nine different loans in Shelby County, Tennessee, and had made other loans (how many not known) in other portions of Tennessee. Petitioners state to your honors that an inspection of the printed record and of the parts of it before referred to, will show that the Eastern Building and Loan Association did a general loan business in Tennessee after March 26th, 1891, loaning to any one holding stock therein. The only difference in the transactions of the association before and after the passage of the Tennessee act on March 26, 1891, is that it does not appear that the association solicited stock subscriptions in Tennessee after that date.

Second.—So far as loaning money was concerned, the certificate merely alludes to the fact that applications for loans were forwarded through the soliciting agent to the association at Syracuse. It might be inferred from

the certificate that the Eastern Building and Loan Association did nothing but receive applications for loans at Syracuse, New York, and that its agents in Tennessee did nothing as to loans except to forward to New York such applications as parties handed them.

As before shown, the claim on behalf of the Eastern Building and Loan Association (see stipulation of counsel in printed record, pages 112 to 115) is that no stock was sold in Tennessee after March 26, 1891. If this be true, the only business transacted thereafter in Tennessee by the association was loaning money, and the admission in the bill (printed record, page 2) that the association "was lawfully doing business in the State of Tennessee," was an admission that the association was in the business of loaning money in Tennessee after March 26, 1891. The stipulation of counsel (printed record, page 115) says: "The complainant furnished its agent in Shelby County, Tennessee, with printed blanks to be used in effecting loans and other transactions with parties in Tennessee." This fact was not mentioned in the certificate, nor the admission in the bill, nor the statements of the stipulation of counsel, showing a regular loan business had been carried on in Tennessee by the association after March 26, 1891. Petitioners submit all of these facts should be before your honors in answering the questions of law propounded. The said certificate spoke of the recommendation of "the Local Board" accompanying the application for loan, merely saying this recommendation was "in regard to the wisdom of the loan," and that it was the duty of such local board "to

advise the association at Syracuse concerning the value of the property offered and the character of the applicant."

A copy of the "Local Board Charter" of the local board in Shelby County, Tennessee, appears at page 87 of the printed record. This charter so granted by the Eastern Building and Loan Association expressly says: "Applications for loans will not be entertained at the Home Office unless first approved by the Local Board." Petitioners submit that the statement just quoted should be before your honors in the decision of the questions of law. It is not mentioned in the certificate. The Eastern Building and Loan Association had constituted the local board as well as the soliciting agent its agents in Tennessee to bring about and assist it in effecting loans in said State. The Eastern Building and Loan Association had expressly declared that it could not be approached except through its agents in Tennessee, and that their recommendation was absolutely necessary. These facts, which were not mentioned in the certificate, show that the present case is not one where a citizen of Tennessee writes directly to a citizen of another State, and a contract is effected thereby, outside of the State of Tennessee. In the present case, if any contract was made outside of Tennessee, which petitioners deny to be the fact, such contract was brought about and effected by the agents of the association in Tennessee, and never would have been made at all except through the instrumentality of such agents in Tennessee.

So far as H. L. Bedford was concerned, it appeared

from his evidence that he became acquainted with said association through its agent in Tennessee, and that such agent got up the business with him.

(See Bedford's answers 2, 4, 7, 10, 13, on pages 102, 104, 105, 106, of printed record.)

This evidence should be before your honors in answering the questions of law.

Petitioners respectfully submit that when the Eastern Building and Loan Association had its agents in Tennessee who assisted in bringing about and transacting the business of the association in Tennessee, and when such business is admitted by the association to have been carried on by it in Tennessee, that the Tennessee law forbidding such business cannot be evaded or disregarded by the transparent device of having notes executed in Tennessee made payable in New York. All of the evidence, as in the printed record, as to the way the business was carried on, should be before your honors, and not simply the meager statements of facts as contained in the certificate.

Third. The statement of the certificate that Bedford, on March 20, 1891, applied for an advance or loan, which was accompanied by the recommendation of the local board, and that this application was approved May 18, 1891, by the Board of Directors at Syracuse, is misleading. It might be inferred from the statement as made in the certificate that the Eastern Building and Loan Association in New York had received the application and recommendation prior to the passage of the

Tennessee Acts of March 26, 1891, and had closed the contract by the approval of May 18, 1891. Such was not the fact, as is shown plainly and distinctly by the printed record, and such record should be before the court

The recommendation of the local board mentioned in the certificate is the "Appraiser's Report," which appears on pages 82 and 83 of the printed record. The appraiser's report was appended to the application for loan. The application for loan appears on pages 79, 80, 81, 82 of the printed record. The application for loan was dated and sworn to by H. L. Bedford on March 20, 1891, and the appraiser's report (which is same as the recommendation of the local board) was sworn to in Shelby County, Tennessee, on May 5, 1891, thus showing no proposition was made to the association until after May 5, 1891.

The witness Pierce says the "application for loan and appraiser's report attached were received by the association on the 12th day of May, 1891, from H. B. Martin." (See printed record, page 49 [14].)

Fourth. The certificate gives only the defeasance clause of the mortgage, and does not give its date, or the dates of the acknowledgment or recordation. Neither does the certificate give the date when the notes were executed, merely showing the notes were dated May 1, 1891. All of these dates should be before the court, in answering the questions propounded. All of these dates appear in the printed record, which should be before the court.

A copy of the mortgage appears in the printed record at pages 27, 28, 29, 30. It was dated May 1, 1891, acknowledged June 18, 1891, and filed for record in the register's office June 20, 1891. The witness Pierce shows that the notes and mortgage, while dated May 1, 1891, were in fact executed at some time "between May 5th, 1891, and June 29th, 1891." This June 29 is evidently a misprint for June 20, when the mortgage was filed for record. (See printed record, page 52 [17].) These dates are all material upon the question of when and where the contracts were closed. It is evident that the contracts had been closed prior to the recordation of the mortgage, June 20, 1891, or was closed at that time.

Fifth. Petitioners state to your honors that the contracts evidenced by the notes and mortgage were actually closed in Tennessee by the execution of said notes and mortgage. They were executed in Tennessee in accordance with the previous requirements and propositions of the Eastern Building and Loan Association, and were not mere propositions from petitioners, which became contracts when they were sent on to Syracuse, N. Y., to the association at that place. Petitioners submit that the printed record will demonstrate the correctness of petitioner's assertions in this regard. The contract was not closed May 18, 1891, by the approval of the board of directors of the association in Syracuse, N. Y. The resolution passed May 18, 1891, by said board appears on page 88 of the printed record, but does not appear in the certificate. This resolution merely recited that the loan committee in Syracuse had reported that it reco.a-

mended a loan to H. L. Bedford of $4,600. The resolution of May 18, 1891, merely says: "On motion, report of committee was adopted." The report of said "Loan Committee" appears on pages 65, 66 of the printed record, but is not in the certificate. This report is too loose and indefinite to be the basis of any contract, and it does not purport to give the terms of any such contract. It merely recommends that a loan be made "subject to usual conditions and L. B. R." "L. B. R." means local board report. The resolution of May 18, 1891, was nothing but a statement that the association would thereafter make a loan to H. L. Bedford, "subject to the usual conditions or terms," and which conditions or terms were afterwards embodied in the notes and mortgage which the said association had drawn up and presented to Bedford for signature. The terms upon which the said association would make the loan to Bedford were first fixed when the notes and mortgage were drawn up, and the contract was closed when Bedford signed these papers.

The application for loan made by Bedford, dated March 20, 1891, and endorsed by the appraisers May 5, 1891, does not appear in the certificate, but it is in the printed record at pages 79, 80, 81, 82. It is a mere application for a loan of $4,600, for 6½ years; does not undertake to fix the terms of the proposed loan. It is manifest that such paper, taken in connection with the resolution of May 18, 1891, could not form a contract. Bedford in his application merely asked for a loan, and the resolution of May 18, 1891, merely adopted a recommendation of it, the terms not being fixed. The correct-

ness of this is made more manifest by an inspection of the mortgage, which appears in the printed record at pages 27-30.

The application for loan did not mention any notes, or where payable, or fix the terms of the mortgage proposed to be given. Neither were these terms fixed by the resolution of May 18, 1891. The terms were first fixed when the Eastern Building and Loan Association caused the notes and mortgages to be drawn up, and those terms were first agreed to by Bedford when he signed these papers. The printed record, pages 35 and 39 (Answers of Pierce 10, 11, and 18) shows the Eastern Building and Loan Association had its attorney draw up said notes and mortgage. The mortgage which was presented to Bedford for signature contained provisions for notes to be given, payable in New York, and provisions as to insurance, taxes, fines, penalties, forfeitures, &c., as to which no mention had been made in the application for loan. Bedford was required by the mortgage, as written, to agree to a sale of his property upon the slightest default as to insurance, taxes, or otherwise, when no mention of such matters whatever had been made in his application for loan. A comparison of the application for loan and the mortgage will demonstrate that the application did not fix the terms of the proposed mortgage, and that the resolution of May 18, 1891, could not have been the closing of any contract.

In addition to this, Bedford in his application asked for a loan of $4,600 for 6½ years. The printed record shows (but the certificate does not) while he asked for a

loan of $4,600 for 6½ years he only got $4,140, which was paid by draft dated July 8, 1891. (See printed record, page 85.) It cannot be claimed that Bedford in his application for a loan of $4,600 meant $4,600 less the deduction of the fixed premium of $460. The association by section 2 of article 15 of its by-laws was authorized to loan Bedford the full amount of his certificate of stock, or $4,600. This by-law appears in the printed record at page 77. It is not in the certificate, and it should be before your honors.

The bill filled by the Eastern Building and Loan Association (printed record, page 7) shows the first note given by H. L. Bedford fell due "the last Saturday of May, 1891." The unpaid notes were all produced, and are copied in the printed record at pages 89–96. The note last falling due falls due in October, 1897. The witness Pierce shows payment of the first note, falling due "the last Saturday of May, 1891." (See printed record, page 45 [7].)

The mortgage (see printed record, page 28) showed there were 78 notes given by Bedford, falling due monthly. Bedford asked for a loan of $4,600 for 6½ years. That period, from July 8, 1891, when he received the draft, would expire January 8, 1898. It is evident that no loan was made for 6½ years, in fact, and that therefore the Eastern Building and Loan Association did not on May 18, 1891, or at any time, assent to Bedford's proposition as contained in his application for a loan. The said association changed such terms as Bedford stated in such application, and Bedford assented to the changes

and closed the contract by executing the notes and mortgage, as written up for him to execute.

Petitioners represent unto your honors that an inspection of the printed record will show that the contracts evidenced by the notes and mortgage were closed by their execution in Tennessee.

The statement of facts as made in the certificate is not in conflict with this claim and contention of petitioners, but by the omission of the important facts hereinbefore mentioned, and the peculiar wording of the first and third questions of law propounded, your honors might erroneously conclude that the contracts had been closed in New York, and might perhaps, therefore, be governed by New York law. Petitioners respectfully insist that when the Eastern Building and Loan Association was carrying on a business in Tennessee, forbidden by the laws of that State, and in the course of such business takes notes and mortgage which were executed in said State, and the contracts were closed in said State, that such notes and mortgage are void, and that the laws of Tennessee must govern as to this matter, and not the laws of any foreign State.

Petitioners most respectfully ask that the facts upon which their contention as to the law are based be ascertained from the printed record of the cause, and not from any erroneous impression of what the United States States Circuit Court of Appeals decided, or from any erroneous decision of that court as to facts, if it made such decision.

Sixth. Petitioners state further that the said certificate

omits to mention various portions of the charter and by-laws of the Eastern Building and Loan Association, and omits to mention other evidence in the printed record, all of which are material and should be before your honors in the decision of the questions of law propounded.

Section 2 of article 15 of the by-laws (printed record, page 77) authorized the loaning of sums to a borrower in amounts equal to or greater than the stock held by him. Bedford's application for a loan of $4,600, in view of this section, was an application for $4,600—not any less sum—and the said association changed the terms proposed by Bedford when it only actually loaned him $4,140. If these terms were changed, the contract clearly was not concluded until the notes and mortgages were signed—in Tennessee.

Article 3 of the charter of the association and section 3 of article 1 of its by-laws (printed record, pages 55, 69) provide for the transacting of business outside of the State of New York. The said by-law says: "Branches or agencies may be located and business done in any part of the State of New York, or in any other State or Territory of the United States where no legal prohibition exists."

It thus appears that even under its own charter and by-laws the association was not authorized to transact business in Tennessee in face of the "legal prohibition" of the Tennessee laws.

Section 5 of article 16 of the by-laws provides for issuance of charters to local boards by the association

(printed record, page 78). The application for local board charter, or the charter of said local board in Shelby County, Tennessee, appears at page 87 of the printed record. It says: "Applications for loans will not be entertained at the home office, unless first approved by the Local Board." The printed record (page 86) shows a local Board did exist in Shelby County, Tennessee, and that officers were elected August 13, 1890. The witness Pierce (printed record, page 50 [15]) shows a local board had been chartered by the association in Shelby County, Tennessee, and that such local board appointed the appraisers who certified as to the value of Bedford's property.

All of the various portions of said charter and by-laws, and the evidence above referred to, should be before your honors, as all of the same bears directly upon the contracts in question and the construction to be given the same.

Article 17 of the charter of the association divides its funds into "the loan fund and the expense fund," and provides the loan fund could also be used to pay amounts due withdrawing shareholders. (Record, page 60.)

Section 3 of article 19 of the by-laws provides (printed record, page 73), "all loans made by this association shall be made upon satisfactory note and first mortgage secured on real estate," etc.

Section 1 of article 15 (printed record, page 77) provides "each shareholder for each share named in their certificate shall be entitled to a loan of $100 from the association, provided they shall first make application

for such loan upon a blank furnished by the association for that purpose, if the condition of the loan fund in the treasury shall warrant it."

The various sections of said charter and by-laws are not mentioned in the certificate, and should be before your honors. The said sections show that a stockholder in said Eastern Building and Loan Association had no vested right to a loan by being a stockholder. He could simply ask for a loan, and get it or not, as the association might choose.

Petitioners call the attention of your honors to the case of Illinois B. & L. Ass'n *v.* Walker, 42 S. W. Rep., 192, where the Supreme Court of Tennessee decided, where the facts were similar to those of the present case, that a stockholder had no fixed right to a loan—that such a stockholder "had merely acquired a status that would enable him to open negotiations for a loan," and that the loan was illegal when the corporation had not complied with the Tennessee acts of 1891.

Fourth.

Your petitioners most respectfully ask leave, in the event the motion herein to have the whole case certified for review and determination shall be denied, that they may be permitted to file ten copies of the printed record of the case, as used in the said Circuit Court of Appeals, for reference and use in the determination of the questions and propositions of law so certified, in addition to the statement of facts contained in the certificate of the judges of the said Circuit Court of Appeals; and the

reasons contained in paragraph No. 3 of this petition and the various subdivisions thereof, are assigned as reasons for this branch of this petition and the motion.

Petitioners respectfully represent unto your honors that there is no conflict between the statement of facts in the certificate and the facts as they appear in the printed record, but that the omission from the certificate of the many facts set forth in paragraph 3 and its various subdivisions, may give your honors a wrongful impression as to what the real facts of the case are. Petitioners most respectfully submit that the questions of law propounded should be answered as applicable to the real facts of this case, and that in order to accomplish this result the whole record should be before your honors. As to the filing of the ten printed copies of the record, petitioners state that only such number of copies can be procured from the clerk of the United States Circuit Court of Appeals at Cincinnati, and that it would work a hardship upon petitioners to have a record reprinted which is already in print. Especially is this true when the case is before your honors upon the request of the judges of the Circuit Court of Appeals for your honors' instructions to them, and when it becomes necessary that your honors see the whole record in order to give instructions applicable to the real case and facts at issue. Petitioners submit herewith a stipulation or agreement of counsel as to the proposed use of said printed record, and make said agreement a part of this petition as Exhibit "A" thereto.

Fifth.

Petitioners submit herewith a copy of the printed record as used in said Circuit Court of Appeals, and make the same a part of this application.

Therefore your petitioners respectfully pray that a writ of certiorari may be issued out of and under the seal of this honorable court, directed to the United States Circuit Court of Appeals for the Sixth Circuit, commanding said court to certify and send to this court on a day certain to be therein designated a full and complete transcript of the record of all proceedings of said Circuit Court of Appeals therein, and of said case entitled H. M. Bedford and Lou M. Bedford, his wife, *v.* Eastern Building and Loan Association of Syracuse, N. Y., to the end that said case may be reviewed and determined by this court as provided in section 6 of the act of Congress entitled "An act to establish Circuit Courts of Appeal and to define and regulate in certain cases the jurisdiction of the courts of the United States, and for other purposes," approved March 3, 1891, and that your petitioners may have such other and further relief or remedy in the premises as to this court may seem proper, and that they may, in the event the prayer to this petition to bring up the whole case shall be denied, be permitted to file and use the printed copies of the record of the said Circuit Court of Appeals, as prayed for in the fourth paragraph of the petition.

Petitioners state that the title of the cause in the Circuit Court of Appeals, as given in said printed record,

is "H. M. Bedford and Lou M. Bedford, his wife, *v.* Eastern Building and Loan Association of Syracuse, N. Y." The initials of the petitioner H. L. Bedford are given as "H. M. Bedford," by mistake, but the case in the printed record is the one that the petitioners have mentioned and referred to as being the litigation between said association and petitioners.

And your petitioners will ever pray, etc.

HEBER J. MAY,
R. M. HEATH,
W. C. MCLEAN,
Attorneys for Petitioners.

I, H. L. Bedford, one of the petitioners in the foregoing and hereto annexed petition, do swear that the facts stated therein are true, so help me God. I further swear that I am the party referred to in the title to said cause in which said petition is filed as H. M. Bedford, the initials of my name having by mistake been given as "H. M." instead of H. L. Bedford.

H. L. BEDFORD.

Subscribed and sworn to before me at Memphis, Tennessee, on this 24th day of November, A. D. 1899, by the said H. L. Bedford.

JOHN B. CLOUGH,
[SEAL OF COURT.] *Clerk of said U. S. Circuit Court, at said Memphis.*

I, ——— ———, attorney for the petitioners above named, have carefully examined the foregoing petition,

and all the facts in connection with said cause, and in my opinion the said petition is well founded and meritorious.

HEBER J. MAY.
R. M. HEATH.
W. C. MCLEAN.

MOTION.

H. M. BEDFORD AND LOU M. BEDFORD, HIS WIFE,
vs.
EASTERN BUILDING AND LOAN ASSOCIATION OF SYRACUSE, N. Y. } No. —.

And now comes H. L. Bedford, being the party called H. M. Bedford in the title to above cause, and Lou M. Bedford, his wife, and move this honorable court for a writ of certiorari, or other proper process, directed to the Honorable Judges of the Circuit Court of Appeals for the Sixth Circuit, requiring said court to certify to this court for its review and determination a certain cause now pending in said Circuit Court of Appeals, in which that court has certified to this Honorable Court certain questions or propositions of law, the said cause being entitled, H. M. Bedford and Lou M. Bedford, his wife, appellants, *v.* Eastern Building and Loan Association, of Syracuse, N. Y., appellees; and for the purposes of this motion the movers tender herewith their petition, together with a copy of the record in said cause in the said Circuit Court of Appeals. And in the event this motion to certify the whole case to the Supreme Court of the United States shall be denied, it is hereby moved

that we may be given leave to file ten copies of the printed record of the Circuit Court of Appeals for reference and use in determining the questions and propositions of law so certified, for the reasons stated in the petition.

HEBER J. MAY,
R. M. HEATH,
Attorneys for Bedford.

H. M. BEDFORD AND LOU M. BEDFORD, HIS WIFE,
vs.
EASTERN BUILDING AND LOAN ASSOCIATION OF SYRACUSE, N. Y. } No.—

To BUCHANAN & MINOR,
Attorneys for Eastern Building and Loan Association of Syracuse, N. Y.

(The firm of Buchanan & Minor was composed of H. D. Minor and J. W. Buchanan.)

Notice is hereby given that upon the petition of H. L. Bedford and wife, Lou M. Bedford, appellees in the above-entitled cause, verified by H. L. Bedford, a copy of which petition is herewith served upon you, and upon all the pleadings and proceedings therein, we shall, on Monday, the 18th day of December, 1899, at the opening of court on that day, or as soon thereafter as counsel can be heard, submit a motion, a copy of which is herewith served upon you, to the Supreme Court of the

United States, at the Supreme Court Room, at the Capitol, in the City of Washington, D. C.

H. L. BEDFORD,
LOU M. BEDFORD,
Petitioners.

HEBER J. MAY,
R. M. HEATH,
W. C. McLEAN,
Attorneys.

Service of the foregoing notice is hereby admitted, and a copy thereof, and a copy of the petition and motions therein mentioned, received this 24th day of November, A. D. 1899.

H. D. MINOR, and
J. W. BUCHANAN,
Attorneys for Eastern Building and Loan Association.

EXHIBIT "A."

Stipulation or Agreement of Counsel.

We have received a notice that motion will be made on behalf of H. L. Bedford and wife, Lou M. Bedford, before the Supreme Court of the United States at Washington, D. C., that the original record in the cause styled H. M. Bedford and Lou M. Bedford, his wife, *v.* Eastern Building and Loan Association of Syracuse, N. Y., pending in the United States Circuit Court of Appeals for the Sixth Circuit, be sent up to said Supreme Court of the United States for review, and that in any event ten printed copies of such original record should be used

before and by said Supreme Court of the United States, in addition to the certificate sent it by said Circuit Court of Appeals. We hereby agree that if the Supreme Court of the United States should decide that such record should be sent up to it for review, or should decide that said original record can be used before and by it for any purpose, that then ten copies of such printed record, being the same that were printed for use in said Circuit Court of Appeals, or any less number of such printed copies, may be used in said Supreme Court of the United States. We waive the necessity of any copies of such printed record being furnished to the Eastern Building and Loan Association or its counsel, as they already have copies of such printed record. We also agree that upon the pre-sentation of said motion to the Supreme Court of the United States, that the copy of the printed record in said cause, as used in the Circuit Court of Appeals, which Mr. Heber J. May of Washington, D. C., has in his possession, may be used by him for the purposes of said motion, and we waive the necessity of such printed copy being certified.

We agree to the foregoing, providing the rules and practice of the Supreme Court of the United States permit us to make the waiver as stated, but nothing in this stipulation is to be taken as a waiver of objections to the motion mentioned.

H. D. Minor and
J. W. Buchanan,
Attorneys for Eastern
Building and Loan Association.

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No. 153.

Br. of May for Bedford et al.

Filed Nov. 19, 1900.

SUPREME COURT OF THE UNITED STATES.

October Term, 1900.

No. 153.

H. L. BEDFORD AND LOU M. BEDFORD, His Wife,

vs.

THE EASTERN BUILDING AND LOAN ASSOCIATION, of Syracuse, New York.

BRIEF

For H. L. Bedford and wife, Lou M. Bedford.

Heber J. May,
Robert M. Heath,
W. C. McLean,
Attorneys for Bedford and Wife.

POOR COPY

DARK PAGE BLEED THRU

SUPREME COURT OF THE UNITED STATES.

October Term, 1900.

H. L. BEDFORD AND LOU M. BEDFORD

vs.

THE EASTERN BUILDING AND LOAN ASSOCIATION, of Syracuse, N. Y.

No. 153.

STATEMENT OF CASE AND BRIEF ON BEHALF OF H. L. BEDFORD AND WIFE, LOU M. BEDFORD.

STATEMENT OF FACTS.

This case came before this Court originally upon a certificate from the United States Circuit Court of Appeals for the Sixth Circuit, asking the decision of four questions of law. Conceiving that the statement of facts as contained in said certificate may not be quite full enough for a thorough understanding of the questions submitted as applicable to this case, Bedford and wife asked for the full record in the case which has been transmitted to this Court and is now before it for its consideration. There is no conflict of evidence, and the facts are undisputed. There is no contradiction or conflict between the statement of facts as contained in the certificate and the facts as shown in the record, but the questions of law submitted, as raised in this case, will be better understood by the fuller statement from the record.

The Eastern Building and Loan Association, of Syracuse, N. Y., is a corporation organized under the laws of the State of New York, which was doing business in Shelby County, Tennessee, and at other points in said State. H. L. Bedford, a resident of Shelby County, Tennessee, in said county, executed certain notes to said association, dated May 1, 1891, and payable on their face in Syracuse, N. Y. These notes were secured by a mortgage upon lands situated in Shelby County, Tennessee, executed by Bedford and wife in said county. The mortgage was dated May 1, 1891, was acknowledged June 18, 1891, and was registered June 20, 1891.

Record, pp. 22-25.

The Eastern Building and Loan Association on June 24, 1895, filed its bill in the United States Court at Memphis, Tennessee, to foreclose said mortgage, a number of said notes being unpaid. This bill (Record, p. 1) mentioned the different dates of the different transactions in which H. L. Bedford was concerned, and alleged that said corporation, "at the times hereinafter mentioned, was lawfully doing business in the State of Tennessee." The facts are as follows:

On January 2, 1891 (Record, pp. 51-52), H. L. Bedford applied for forty-six shares in the Eastern Building and Loan Association. On February 2, 1891, the certificate of stock in said association for forty-six shares (Record, p. 53) was issued to H. L. Bedford. An application for a loan from said association was made by H. L. Bedford (Record, pp. 63-66), the same being made in Shelby County, Tennessee, and being dated March 20, 1891. On the back of this application is the "appraisers' report" of the value of the real estate offered as security, executed and sworn to by said appraisers in Shelby County, Tennessee, on May 5, 1891. (Record, pp. 66-67.)

The notes and mortgage were not executed until after this appraisers' report of May 5, 1891. (Record, p. 42) (17). On the back of the application and appraisers' report is marked "approved May 18, 1891. (Record, p. 67.) While the application for loan bears date March 20, 1891, D. A. Pierce, the witness for the Eastern Building and Loan Association (Record, p. 27) (8) says "it was made on or prior to May 5, 1891." The same witness (Record, p. 40) (14) says: "Said application for loan and appraisers' report attached were received by the association on the 12th day of May, 1891, by mail from H. B. Martin," said Martin being the agent of said association in Shelby County, Tennessee. The "loan committee," composed of A. H. Hubbs (Record, pp. 52-53) then approved the loan asked for and recommended that it be granted "subject to usual conditions and L. B. R." The letters "L. B. R." meant "Local Board Report." This "loan committee" was at the home office of the association in New York. (Record, pp. 31 (18), 40 (14.)

The Eastern Building and Loan Association then, by entry in its minutes (Record, p. 70) adopted the report of such "loan committee" May 18, 1891. The application for loan (Record, pp. 63-66) merely described the property which H. L. Bedford offered to mortgage. No terms whatever were fixed by this application, except that it was "for loan of forty-six hundred ($4,600) dollars for six and a half years, to bear interest at the rate of 5 per cent. per annum and a premium of 5 per cent. per annum, payable on or before the last Saturday of each month, all payments to be paid at such place as the lender may direct, and to secure the same ———— agree to give a mortgage on

the real estate set forth in the following questions and answers." The Eastern Building and Loan Association did not assent to making any loan until May 18, 1891, and did not then specify the terms thereof. When these terms were made known to H. L. Bedford in Tennessee they were for him to execute seventy-eight notes, dated May 1, 1891, the first note due the last Saturday of May, 1891, and the last note due the last Saturday of October, 1897. The mortgage (Record, p. 23) shows the notes were seventy-eight in number of date May 1, 1891, one note falling due "the last Saturday of each and every month." The bill (Record, p. 2) shows the first note was due "the last Saturday of May, 1891." The answer (Record, p. 13) required "the production of these notes." The unpaid notes were produced (Record, pp. 71-77, and the note last falling due is in October, 1897. The witness Pierce (Record, p. 36 (7) shows payment of a note falling due "the last Saturday of May, 1891." A simple calculation shows seventy-eight notes due monthly, beginning May, 1891, would end in October, 1897. The statement of the bill (Record, p. 2) that the last note fell due in November, 1897, is clearly an error. The witness Pierce (Record, p. 30 (15) shows the money advanced to Bedford was by draft of date July 8, 1891, for $4,140. (Record, p. 68.) The mortgage (Record, pp. 22-25) contains numerous conditions which were not mentioned in Bedford's application and which terms were of course unknown to him until he was called on to execute the mortgage. The Eastern Building and Loan Association had this mortgage and the notes prepared. (Record, pp. 28-29, 31, 32) (10-11-18.) The mortgage contained provisions securing "fines and penalties," taxes, etc., which Bedford was ignorant of until he received the papers for signature. Bedford asked for a loan for six years and a half. That time from July 8, 1891, when the draft issued, would expire January 8, 1898. It is perfectly apparent that in requiring notes, the last of which fell due in October, 1897, when he got no money prior to July 8, 1891, that the Eastern Building and Loan Association did not close any contract May 18, 1891, when it assented to making a loan. It did not then agree to any proposition made by Bedford, but merely consented to making a loan, the terms of which were afterward fixed by it when it prepared the notes and mortgage and got Bedford to assent to them in Tennessee by signing them. The application for loan (Record, pp. 63-66) was for a loan of $4,600. Such application did not promise to pay a fixed premium of 10 per cent. to be taken out of such loan, and no reference was made to the charter or by-laws, which may have allowed such deduction. When the contract was closed in

Tennessee a deduction of fixed premium of $460 was made, and Bedford got only $4,140, though the notes covered the $4,600.

Record, pp. 28 (10), 84 (8), 47 (10).

H. L. Bedford was also required to execute the following withdrawal of his shares of stock, viz.:

"The within shares of stock in the Eastern Building and "Loan Association of Syracuse, N. Y., are hereby withdrawn, "and I have this day received the sum of forty-six hundred dol-"lars in full of the amount due me by reason of such with-drawal.

"Dated at Memphis, July 16, 1891.

"[Seal.] H. L. BEDFORD.

"Witness—J. H. T. Martin."

Record, p. 63.

The by-laws of the Eastern Building and Loan Association provide "that a payment of one hundred dollars per share "named in the certificate that has been in force till maturity "shall be accepted as full payment of all claims on their certifi-cate as against this association."

Record 62 (21).

The by-laws provide for withdrawal of shares before ma-turity.

Record, 61 (18-19).

The stock held by H. L. Bedford matured at the fixed date, August 1, 1897.

Record, p. 53.

The loan of $4,600 was the estimated "maturity value" of the stock.

Record, p. 78 (2).

Bedford never had any loan for six and a half years, and only got $4,140, and made no agreement until the papers were executed by him. The six and a half years can only be made out by going back to the date May 1, 1891, and the corpora-tion never even expressed a desire to make any loan until May 18, 1891. Bedford's application for loan fixes no dates. All terms were fixed by the Eastern Building and Loan Associa-tion, and fixed in such a way that Bedford never had any loan for six and a half years, and never any loan of $4,600, and the stock was withdrawn absolutely.

After the Eastern Building and Loan Association assented to making a loan on May 18, 1891, H. L. Bedford (Record, pp. 67-68) made what is called an "application for advance," ask-ing that the loan or advance be made. In this application for advance (Record, pp. 67-68) H. L. Bedford, for the first time in reference to the loan, referred to the charter and by-laws. Section 2 of artile 15 of the by-laws of the association (Rec-

ord, p. 62) authorized the loaning of funds to any one in greater sums than the amount of stock held by the borrower, and Bedford's application was to borrow $4,600, not $4,600 less $460. Attached to this "application for advance" is an affidavit of H. L. Bedford, dated June 20, 1891, as to title of the property mortgaged, etc. (Record, pp. 67-68.) The mortgage was acknowledged June 18, 1891, and registered June 20, 1891. The witness, Pierce, who was attorney for and a director in the Eastern Building and Loan Association (Record, 27-28) (9), says in his testimony this "application for an advance to which is attached the affidavit of one H. L. Bedford is the acceptance by the applicant of the action of the Board of Directors of May 18, 1891," and an "additional agreement by him to comply with the charter, by-laws," etc.

It is not contended by the association that the contract was closed or concluded in New York after Bedford executed the notes and mortgage by any acceptance of them in New York by such association. The witness Pierce, in his testimony (Record, p. 42) (18), claims "the contract for the loan to Bedford was concluded at the home office of the association at the meeting of its Board of Directors," May 18, 1891. It is apparent, however, that the contract was not concluded May 18, 1891, in New York, as Bedford did not then know the terms of the notes and mortgage afterward executed by him, and never in fact knew such terms until he signed such papers afterward in Tennessee.

The application for advance (Record, pp. 67-68), has attached to it an affidavit of date June 20, 1891. At that date the papers had all been executed and the mortgage recorded, and the notes were in the hands of the association or its agent, After this nothing whatever was done, and the contract was necessarily closed in Tennessee by the execution of the papers and the recordation of the mortgage. All this had been done at the dictation and direction of the association, and after June 20, 1891 no acceptance was required of the association in New York to complete the contract, which had been made as it directed. The contract was completed by Bedford having done in Tennessee all he was required to do by the association. After June 20, 1891, the association merely paid over the money to Bedford, but this payment was merely in consequence of the contract previously concluded.

The witness Pierce (Record, pp. 40-41) (15), shows the method by which Bedford and all borrowers obtain loans was to make out an application for loan "upon a printed form furnished" by the corporation through its Tennessee agent, bring it to the attention of the local board in Tennnessee and have the appraisers in Tennessee report thereon, "after which it

was transmitted to the association in New York, where it was passed upon." If granted by such association, as it did herein, on May 18, 1891, an abstract of title was required, which had to be approved, and, if approved, the papers were prepared in New York and sent on for the proposed borrower to execute, "with such instructions as the circumstances in each case might require." After the papers were executed and the mortgage recorded they were returned to the corporation in New York. The money was then "forwarded to the applicant through the local soliciting agent of the association or the local attorney by draft of the association." There was no direct communication whatever between H. L. Bedford and the New York corporation. Every paper he signed was on a printed form provided by the Eastern Building and Loan Association to its agents in Tennessee. (Record, 83 (3) 40-41 (15), and everything to or from him, including payments, passed through the hands of the agents of the Eastern Building and Loan Association in Shelby County, Tennessee. (Record, 35-36 (3) (4) (5) 37-38 (8) 39 (12) 40 (14) 40-41 (15) 42 (17) 83 (4) 86 (16) 63 (4). The witness Pierce (Record, pp. 42-43 (18) says: "It is a fact, however, I believe, that the payments were received through J. H. T. Martin and his successor as local treasurer, but as agent for Bedford."

An agreement of counsel (Record, 90-92) shows that all loans made by the Eastern Building and Loan Association in Tennnessee were made in the same way that the Bedford loan was made. The Bedford transaction was part of its general business in Tennessee conducted in the way all the business in Tennessee was conducted.

Article 3 (Record, p. 45) of the charter of the Eastern Building and Loan Association, and section 3 of article 1 of its by-laws, provide for transacting business outside of the State of New York. The said by-law (Record, p. 55) says: "Branches or agencies may be located and business done in any part of the State of New York or in any other State or Territory of the United States, where no legal prohibition exists." Article 18 of the charter (Record, p. 49) provides: "The directors of this association may enter into such contracts and appoint such agents for its business management as they may deem for the best interest of its affairs." Sections 1 to 6 of article 16 of said by-laws (Record, pp. 62-63) provide for the establishment of "local boards" in the different States. Section 2 of article 16 (Record, p. 63) provides, "traveling agents of the association" could appoint the first officers of the local boards. Section 3 of article 16 provides (Record, p. 63): "*It shall be the duty of the officers of the local board to pass on all applications for loans which are received by the association from mem-*

bers residing in the town where such local board is located and to protect the interests of the association in all practicable ways." Section 4 of article 16 (Record, p. 63) provides: "*Members may, if they so desire, make monthly payments on stock to the local treasurer.* But such local treasurer shall be deemed to be the agent of the members, and not of the association." Section 5 of article 16 (Record, p. 63) provides for the issuance by the Eastern Building and Loan Association of charters to the different local boards in the different States. The application for the local board charter in Shelby County, Tennessee (Record, p. 70), says: "It is the duty of local board to assist the association in every way possible in the transaction of its business. *No loans will be made to members unless they are connected with and under the jurisdiction of a local board. Applications for loans will not be entertained at the home office unless first approved by the local board.*" The record showed there was a local board at Memphis, Shelby County, Tennessee, and (Record, p. 69) that officers were elected August 13, 1890.

Mr. Pierce, in his evidence (Record, p. 40 (15), showed this local board at Memphis appointed the appraisers, who appraised Bedford's property May 5, 1891. The witness said: "The appraisers were appointed by the local board, whose duty it was to certify as to the value of the property offered as security on all applications for loans."

This witness Pierce (Record, p. 33 (20) spoke of the association as having "considereble business' at Memphis, Shelby County, Tennessee, and of its necessitating a local board, he saying the purpose of such local board "was to foster the business of the association in the particular locality, and to afford the members of the association connected therewith a means of communication with the association at the home office, and to facilitate the transaction of any business which they have with the association."

At the time of the transactions in question herein the Eastern Building and Loan Association had its agents, H. B. Martin, and J. H. T. Martin representing it in Shelby County, Tennessee, as well as its local board.

(Record, pp. 35-36 (3, 4, 5), 32-33 (20), 83-84 (4, 5, 6), 69-70.)

It appeared also that the Eastern Building and Loan Association carried on business at other points in Tennessee, as an agreement of counsel (Record, p. 92)) says: "During the period covered by the transactions with defendants the complainant made some loans in Tennessee outside of Shelby County." The bill of the Eastern Building and Loan Associa-

tion (Record, p. 1) alleged, generally, it was *"doing business in the State of Tennessee."*

The agreement of counsel before mentioned shows (Record, pp. 91-92) that after the passage of the prohibitory laws by the Legislature of the State of Tennessee, hereinafter mentioned, the said association, though it knew of such laws, claimed the right to continue this general loan business to all parties who held stock in said association, and that it did, in fact, continue such general loan business without complying with the terms of such laws. This agreement of counsel (Record, pp. 90-92) showed that the Eastern Building and Loan Association made nine loans in Shelby county, Tennessee, exclusive of the one in question herein, and that the association "made some loans in Tennessee outside of Shelby County."

The dates and amounts of the Shelby County loans were as follows:

June 1, 1891, William Short	$ 1,482 78
Sept. 1, 1890, J. H. T. Martin	6,795 36
Oct. 1, 1890, Thomas E. Edwards	2,718 30
Dec. 1, 1890, E. E. Rudisill, et al	4,201 08
Jan. 1, 1891, J. H. T. Martin	8,293 74
Jan. 1, 1891, H. L. Trezevant, et al	3,706 56
April 1, 1891, A. E. Jenkins, et al	1,235 52
July 1, 1891, R. B. Pegram, et al	2,639 06
July 1, 1891, G. and M. E. Sims	551 45
	$31,623 85
Add Bedford loan	$ 4,600 00

Of the above the following loans were made after the passage of the acts of the Legislature of Tennessee in 1891, defining the terms upon which foreign corporations could do business in Tennessee, viz.:

June 1, 1891, William Short	$ 1,482 78
April 1, 1891, A. E. Jenkins, et al	1,235 52
July 1, 1891, R. B. Pegram, et al	2,639 06
July 1, 1891, G. and M. E. Sims	551 45
H. L. Bedford	4,600 00
	$10,508 81

The said association claimed the right to make loans even when the applictaions for loans were dated after the passage of the Tennnessee acts, as William Short's application was dated May 11, 1891; Gilbert Sims' application dated May 23, 1891, and R. B. Pegram's application dated April 13, 1891. (Record, p. 91.)

H. L. Bedford, in his testimony shows the business with him was gotten up by the agents of the Eastern Building and Loan Association in Tennessee and in consequence of their efforts—that witness further showed that when he had the transactions in question he was ignorant of the passage of the prohibitory laws by the Legislature of the State of Tennessee as to foreign corporations, and of course was ignorant that the Eastern Building and Loan Association had not complied with the terms of such laws.

Record, pp. 84 (7, 10), 85 (12, 13), 93 (2).

Article 17 of the charter divides the funds of the association into "the loan fund and the expense fund," and provides the loan fund can be used for the making of loans on security, as provided by the by-laws and to pay amounts due withdrawing shareholders. The funds of the association not required for advances on shares may be invested" in securies or deposited. (Record, pp. 48-49.)

Section 3 of Article 19 of the by-laws of the association provides: "All loans made by this association shall be made upon satisfactory note and first mortgage secured on real estate," etc. (Record, p. 59.)

Section 1 of Article 15 of by-laws (Record, p. 62) provides: "Each shareholder for each share named in their certificate shall be entitled to a loan of $100 from the association, provided they shall first make application for such a loan upon a blank furnished by the association for that purpose, if the condition of the loan fund in the treasury shall warrant it. All applications for loans shall be filed and numbered consecutively as received and be examined and approved or rejected by the board in their regular order."

Section 2 of Article 15 of the by-laws provides: "Nothing herein contained shall prevent the board of directors from loaning funds of the association to any member in greater sums than the above provided upon approved securities."

Record, p. 62.

The Eastern Building and Loan Association filed its bill June 24, 1895 (Record, p. 1) to foreclose the mortgage executed to secure the notes falling due in June, 1893, and after such notes being unpaid.

Bedford and wife in their answer claimed that when the loan was made and the mortgage executed that the Eastern Building and Loan Association were carrying on business in Tennessee illegally—that various statutes had been passed by the Legislature of Tennessee fixing the terms upon which foreign corporations could carry on business in Tennessee, and that the Eastern Building and Loan Association had not complied with the terms of said statutes. (Record, pp. 12-19.) The

contracts in question were claimed to be void. The acts in question are as follows, viz.: Chapter 31 of Acts of 1877, passed March 19, 1877; Chapter 95 of Acts of 1891, passed March 10, 1891, approved March 17, 1891; Chapter 122 of Acts of 1891, passed March 21, 1891, approved March 26, 1891, and Chapter 2 of Acts of 1891, passed March 26, 1891, opproved March 28, 1891.

The Act of March 19, 1877, Chapter 31, applies only to certain classes of foreign corporations. Section 2 thereof required the foreign corporation "desiring to carry on its business" in Tennessee to "first file in the office of the Secretary of State a copy of its charter, or articles of association," and to "cause an abstract of the same to be recorded in the office of the Register of each county in which such corporation proposes to carry on its business or to acquire lands." The Act of March 10, 1891, Chapter 95, merely extends the above act of 1877 to certain other classes of foreign corporations, including building and loan corporations. The Act of March 21, 1891, Chapter 122, of Acts of 1891, by Section 1, extends the Act of 1877 to all foreign corporations, "which may desire to do any kind of business in this State." Section 2 of this act (Chapter 122) provides that all foreign corporations "desiring to own property or to carry on business in this State of any kind or character shall first file in the office of the Secretary of State a copy of its charter, and cause an abstract of the same to be recorded in the office of the Register in each county in which such corporation desires or proposes to carry on its business or to acquire or own property as now required by Section 2 of Chapter 21 of Acts of 1877." Section 3 of Chapter 122 of Acts of 1891 provides "that it shall be unlawful for any foreign corporation to do or attempt to do any business or to own or to acquire any property in this State without first having complied with the provisions of this act, and a violation of this statute shall subject the offender to a fine of not less than $100 nor more than $500, at the discretion of the jury trying the case."

The act of March 26, 1891, Chapter 2, of Acts of 1891, applies only to building and loan corporations and associations. Section 3 thereof provides that no foreign building and loan association or corporation "shall do business in this State unless said association or corporation shall (deposit and continually thereafter) keep deposited in trust for all its members and creditors" certain securities amounting to not less than $25,000 nor more than $50,000, "at the discretion of the State Treasurer."

All such foreign building and loan corporations or associations were further required, "before commencing to do busi-

ness in this State. First, file with the Treasurer of this State a duly authenticated copy of its charter or articles of incorporation; second, file with the Treasurer of this State the certificate of the proper State officer of another State or commencing to do business shall deposit with the said Treasurer of the State or trust company in trust as aforesaid securities of the value of $25,000." The section then defines what the securities shall consist of. This act in Section 6 defines the prohibited business as "loaning its funds to its members, whether issuing certificates of stock which mature at a fixed time in advance or not."

Section 5 of this act is as follows:

"Sec. 5. Be it further enacted, That when by the laws of any other State, Territory or nation, any taxes, fines, penalties, licenses, fees, deposits of money securities or other obligations or prohibitions are imposed on building and loan associations of this State doing business in such other State, Territory or nation, or upon their agents therein, so long as such laws continue in force, the same obligations or prohibitions of whatever kind, shall be imposed upon all building and loan associations of such other State, Territory or nation, doing business in this State, and upon their agents here."

The Legislature of New York, on July 1, 1882, passed an act, being Chapter 409. This act covered various classes of corporations, domestic and foreign, including building and loan associations. By Section 224 of such act all such corporations were required to "transfer and assign to the said superintendent (superintendent of the Banking Department of the State of New York), registered public stocks of the United States, or of the State of New York, or of any incorporated city of this State authorized by the Legislature to the amount in value (and to be at all times so maintained by said corporation) of ten per centum on the paid up capital stock of said corporation, now or at any time hereafter, but not less in any case than $50,000, which stocks must be registered in the name of the superintendent officially as held in trust under and in pursuance to this act" as security for creditors of said corporation, etc.

This Act of New York (Chapter 409, of 1882) continued in force until January 5, 1892, when another act was passed in its place, being Chapter 689. This act (Chapter 689) embraced foreign and domestic corporations, including building and mutual loan corporations. This act (Section 14) provides: "Every such corporation hereafter proposing to engage in such business in this State shall, before engaging in such business, transfer and assign to the superintendent registered public stocks or bonds of the United States or of this Sitate, or of any city, county, town, village or free school district in this State

authorized by the Legislature to be issued to the amount in value and to be at all times so maintained by the corporation of ten per cent. on its paid up capital stock, but not less in any case than $100,000 in cities the population of which exceeds 500,000 inhabitants." The act required this transfer of securities to be in the sum of $100,000, $50,000, $30,000 or $20,000, the same being dependent upon the number of inhabitants in the particular city where the business was to be carried on. Twenty thousand dollars was the lowest amount required. The act provides: "Such stocks must be registered in the name of the superintendent officially in trust" as security for creditors of such corporation.

Section 31 of this act provides that no foreign corporation "shall transact business in this State without the written permission of the Superintendent of Banks, and a written certificate from him stating that such corporation has complied with all the provisions of this chapter applicable to it, and with all the requirements of law, and that it is authorized to transact the business within this State specified therein, and that such business may be safely intrusted to it."

Section 32 of the same act provides: "No foreign corporation, company or association to which this chapter is applicable shall transact any business in this State until it has executed and filed with the Superintendent of Banks a written instrument appointing such superintendent its true and lawful attorney, upon whom all process in any action or proceeding by any resident of the State against it may be served with the same effect as if it existed in this State and had been lawfully served with process therein," etc.

It thus appears that the State of New York by act (Chapter 689 of July 5, 1892) required Tennessee building and loan associations, "before engaging" in business in New York to deposit funds or security therein of from $20,000 to $100,000, and required them to appoint a New York official agent upon whom service of process could be made, and required them to take out a license, and that the previous act made similar requirements.

The Acts of Tennessee, Chapter 2, of 1891, Section 5, made the same reciprocal requirements as to New York building and loan corporations in Tennessee that were required of such Tennessee corporations in New York.

An agreement of counsel herein shows no deposits of securities were ever made by the Eastern Building and Loan Association, and no copy of its charter filed with the State Treasurer, as required by Act, Chapter 2, Acts of 1891, and no copy of the charter ever filed with the Secretary of State until August 11, 1893, or registration of same had under the other acts until

August 15, 1893. (Record, p. 114.) On March 28, 1887, an act was passed in the Legislature of the State of Tennessee, being Chapter 226, the title thereof was "An Act to Subject Foreign Corporations to Suit in This State."

Section 2 thereof provided "that any corporations having any transactions with persons, or having any transactions concerning any property situated in this State, through any agency whatever acting for it within the State, shall be held to be doing business here within the meaning of this act."

The record herein plainly discloses the design of the Eastern Building and Loan Association was to carry on business in any State "where no legal prohibition exists." That in order to so carry on business in Tennessee it had its local agents and local boards therein. That it declined to make loans to members unless they were "connected with and under the jurisdiction of a local board," and declined "all applications for loans unless first approved by the local board." That through the assistance of its local agents and local boards in Tennessee it loaned in Shelby County, Tennessee, alone $36,223.85. In addition to this, the Eastern Building and Loan Association expressly admitted in its bill that at the times in question it was "doing business in the State of Tennessee." Although this business was carried on in Tennessee the said association never complied with any of the terms of the act, Chapter 2, of 1891, of Tennessee. The only compliance with the other acts of Tennessee made by said association was that on August 11, 1893, several years after the transactions in question, it filed a copy of its charter with the Secretary of State of Tennessee and filed an abstract thereof with the Register of Shelby County, Tennessee, on August 15, 1893.

Upon the hearing of the case in the Circuit Court of the United States at Memphis, Tenn., such court rendered a decree on June 4, 1898. A judgment was thereby rendered against H. L. Bedford and wife, Lou M. Bedford, for $5,075.37, and the mortgage executed by H. L. Bedford and wife was ordered to be foreclosed. This decree awarded an execution for any balance due after exhausting the proceeds of the sale of the mortgaged premises.

Record, pp. 98, 99, 100.

The learned Judge hearing the cause in the United States Circuit Court filed an opinion setting forth the reasons for his decision.

See Record, pp. 110-116.

On June 4, 1898, Bedford and wife filed an assignment of errors as to the rendition of the decree of June 4, 1898, and ap-

pealed to the United States Circuit Court of Appeals for the Sixth Circuit, at Cincinnati, O.

Record, pp. 116, 117, 118.

Upon the hearing of the cause by the United States Circuit Court of Appeals, that court certified the case to the Supreme Court of the United States, asking the latter court to decide four question of law.

Record, pp. 122-133.

These questions appear in the record at page 133. H. L. Bedford and wife, Lou M. Bedford, thereupon filed their petition in the Supreme Court of the United States, asking that the whole record should be sent up to that court. The prayer of their petition was granted and the whole record and cause is now before the Supreme Court of the United States.

Record, p. 134.

As no decree was rendered by the United States Circuit Court of Appeals at Cincinnati, the cause being merely certified to the Supreme Court of the United States, the said H. L. Bedford and wife, Lou M. Bedford, now repeat their assignments of error as made by them June 4, 1898. (Record, pp. 116-117.) Such parties respectfully insist that the decree of the United States Circuit Court at Memphis was wrong in the particulars set forth in the former assignments of error, and that no liability whatever exists against either H. L. Bedford or Lou M. Bedford, or the property embraced in the mortgage. Such parties now repeat their former assignments of error, and respectfully insist that this cause should be decided in accordance with the principles claimed in the following:

ASSIGNMENTS OF ERROR.

(1). No decree whatever should have been or should be rendered against H. L. Bedford or Lou M. Bedford for any sum whatever.

(2). No decree for costs should have been or should be rendered against H. L. Bedford or Lou M. Bedford or the mortgaged property or its proceeds.

(3). The lower court should have held and the Supreme Court of the United States should hold that the Eastern Building and Loan Association, of Syracuse, N. Y., had not complied with the terms of the acts of the Legislature of the State of Tennessee, viz.: Act of March 19, 1877, being Chapter 31 of Acts of 1877; Act of March 10, 1891, being Chapter 95 of Acts of 1891; Act of March 21, 1891, being Chapter 122 of Acts of 1891.

The requirements of these acts having not been complied with, when the contracts were entered into, it should have been and should be held that the notes executed by H. L. Bedford and the mortgage executed by H. L. Bedford and Lou M. Bedford were void or unenforceable.

(4). The lower court should have held and the Supreme Court of the United States should hold that the Eastern Building and Loan Association, of Syracuse, N. Y., never complied with the requirements of the act of the Legislature of the State of Tennessee of March 26, 1891, being Chapter 2 of said Acts of 1891, and that the notes executed by H. L. Bedford and the mortgage executed by H. L. Bedford and Lou M. Bedford were void or unenforceable.

(5). The lower court should have held and the Supreme Court of the United States should hold that the contracts evidenced by the notes executed by H. L. Bedford and the mortgage executed by H. L. Bedford and Lou M. Bedford were all Tennessee contracts and not New York contracts, and, as such, governed by Tennessee law.

(6). If the notes executed by H. L. Bedford should be considered as New York contracts, they were such simply in the sense of being payable on their face in New York. The lower court should have held and the Supreme Court of the United States should hold that even if the notes were New York contracts they were executed in Tennessee and were made in evasion of the Tennessee statutes, referred to in Nos. 3 and 4 of these assisnments of error. It should have been and should be held that such notes were void or unenforceable in any court

sitting in Tennessee, whether State or Federal, and that the mortgage to secure them was void or unenforceable.

(7). The lower court should have held and the Supreme Court of the United States should hold that the various statutes of the State of Tennessee, before referred to, applied to and governed the notes executed by H. L. Bedford and the mortgage executed by H. L. Bedford and Lou M. Bedford, and that such statutes were not in conflict with the Constitution of the Unite States or any part thereof. It should have been and should be held that under these statutes the said notes and said mortgage were void or unenforceable.

(8). The lower court should have held and the Supreme Court of the United States should hold that the act of the Legislature of the State of Tennessee, being Chapter 226 of the Acts of 1887, defined what was doing business in the State of Tennessee by foreign corporations. It should have been and should be held that the Eastern Building and Loan Association, of Syracuse, N. Y., was doing business in the State of Tennessee in the sense of such statute, without complying with the laws of Tennessee, and that the notes executed by H. L. Bedford, and the mortgage executed by H. L. Bedford and Lou M. Bedford were void or unenforceable.

(9). The lower court should have held and the Supreme Court of the United States should hold that the laws of the State of New York required corporations of other States having transactions with persons in that State, to comply with the regulations of the New York statutes on such subjects, and that where such statutes had not been complied with contracts that were made were either void or unenforceable in New York. Such being the fact, it should have been and should be held that under the Tennessee laws similar requirements were made of New York corporations seeking to do business in Tennessee as were made of Tennessee corporations seeking to do business in New York. It should have been and should be held that the Eastern Building and Loan Association, of Syracuse, N. Y., in carrying on business in Tennessee never performed any of the reciprocal requirements of the Tennessee laws, inasmuch as it never in Tennessee did any of the things which were required in New York of Tennessee corporations seeking to do business therein. The requirements of the New York law as to corporations of other States seeking to do business in New York have hereinbefore been mentioned and are here referred to.

(10). If the notes executed by H. L. Bedford and the mortgage executed by H. L. Bedford and Lou M. Bedford were not wholly void or wholly unenforceable in Tennessee, then the lower court should have held and the Supreme Court of the

United States should hold that the contracts evidenced by the notes of H. L. Bedford were usurious. It should have been and should be held that the charging of a fixed premium of $460 was usury to that extent. It should have been and should be held that when H. L. Bedford was made to withdraw his shares in the Eastern Building and Loan Association, that he lost all interest in any profits of said association, and agreed to pay a fixed amount in a fixed time, and that thereby the transaction became and was usurious. It should have been and should be held that this was the law of Tennessee as well as of New York, and that the Eastern Building and Loan Association, of Syracuse, N. Y., had only the rights which a Tennessee corporation would have had. This being so, H. L. Bedford should be credited with the full amounts which he had paid and all usury should be eliminated, it being apparent that much more than the sum he received and 6 per cent. interest thereon per annum as allowed by Tennessee law is sought to be gotten by the Eastern Building and Loan Association, of Syracuse, N. Y.

(11.) It should have been and should be held that no estoppel existed against H. L. Bedford or Lou M. Bedford to plead the invalidity of the notes or mortgage.

The substance of the above assignments of error is, the notes and mortgage in question are void or unenforceable in Tennessee under Tennessee law, and that such law should govern. If, for any reason, the said notes and mortgage are unenforceable to any extent that then usury exists in the transaction, and such usury should be eliminated.

All of the questions suggested by the assignments of error are fully discussed hereinafter. While the whole record is before the Court, it is deemed best to discuss such questions in reference to the questions propounded in the certificate from the United States Circuit Court of Appeals and in the order suggested thereby. The questions of law propounded in said certificate (Record, p. 133) are as to the validity or invalidity of the transactions in question, and as to the right or power of a United States Court sitting within a State to decline to enforce the State law, denying the enforcement of contracts against its laws.

Of course the decree providing for execution against Mrs. Bedford was wrong. She had not signed the notes and was a married woman.

ARGUMENT.

AS TO THE FIRST QUESTION SUBMITTED.

The first question propounded by the Circuit Court of Appeals (Record, p. 133) is:

"Was the validity of the notes signed in Tennessee by the maker, manually delivered by him to the soliciting agent of the association at Memphis, to be transmitted to the association at Syracuse for the acceptance of the association at that place and payable at Syracuse, to be determined by the laws of Tennessee or of New York?"

We do not understand this question to mean that the Circuit Court of Appeals concluded that the contract in question had not been closed when the notes were executed in Tennessee, or that it was closed when the notes arrived in New York by the acceptance of the association there. We understand the question to be based simply on the idea that the notes were payable in New York.

Viewed from the Tennessee standpoint, there are two classes of New York contracts, one where the contract is executed in Tennessee and payable in New York, and the other where the contract is executed in New York.

We contend that the contract in question was closed in Tennessee, when Bedford executed the notes and mortgage, and that if his contract be considered a New York contract, it is simply one in the sense of the notes being payable on their face in New York. In the statement of facts herein we have shown that Bedford's application for a loan did not fix any terms except to the extent that he wanted a loan for six and a half years of $4,600, and offered to mortgage his land to secure such loan. We have shown that the approval of May 18, 1891, by the association, did not close the contract, but that it was merely an assent by it to making a loan, and that the terms upon which a loan would be made were first fixed when the Eastern Building and Loan Association had the notes and mortgage drawn up. The contract was closed and made when Bedford, in Tennessee, signed these notes and mortgage. When they were sent on to New York after being signed it was not for acceptance by the association in the sense that the contract was to be closed by the association's agreeing to it then. The association had previously fixed the terms and the contract had been closed by Bedford's acceptance thereof, evidenced by his execution of the papers.

"A contract is made when both parties agree to it, and not before. * * * If the contract is in writing, it is made when all the parties have executed, and therefore it is not made until the latest party has put to it his name and seal or both, as may be required."

2 Parsons on Contracts, paragraph 95.

In Campania, etc. vs. Spanish Company, 146 U. S., 497, it is said: "But if there is any part of it (contract) in regard to which the minds of the parties have not met, the entire instrument is a nullity as to all its clauses."

The only contract signed was that evidenced by the notes and mortgage executed in Tennessee.

Where writings are contemplated there is no contract until they are executed.

Ambler vs. Whipple, 20 Wall., 556.
Bourne vs. Shapleigh, 9 Mo. App., 70.
Com. Tel. Co. vs. Smith, 47 Hun., 501.
Sydney Glass Works vs. Barnes, 86 Hun., 378.
Sparks vs. Pittsburgh Co., 159 Pa. St., 295.
Gulich vs. Alford, 61 Miss., 225.
Eads vs. Carondelet, 42 Mo., 113.
Water Commrs. vs. Brown, 32 N. J. L. (3 Vroom), 504.
Riggs vs. Magruder, 2 Cranch C. C., 143.
Spinrey vs. Downey, 108 Cal., 666.
Des Bonlets vs. Gravier, 1 Mart. (N. S.), 420.
Frederick vs. Faisnacht, 30 La., 113, Pt. 1.
Avendano vs. Arthur, Id., 316.

"An offer of a bargain by one person to another imposes no obligation upon the former, unless it is accepted by the latter upon the terms on which it was made. Any qualification or a departure from them invalidates the offer unless the same be agreed to by the party who made it."

Tilly vs. County of Cook, 103 U. S., 161.
Darlington vs. Foote, 16 Fed. Rep., 646.

"A proposal to accept or an acceptance upon terms varying from those offered is a rejection of the offer and puts an end to the negotiation unless the party who made the original offer renews it or assents to the modification suggested."

R. R. vs. Columbus, 119 U. S., 151.

Insurance Co. vs. Young, 23 Wall, 107, is directly in point. In that case the company issued a policy slightly different in terms from the one applied for. It was held there was no contract, as the applicant died before assenting to the policy as issued.

See also Sydney Glass Works vs. Barnes, 86 Hun., 378.
Derrick vs. Monette, 73 Ala., 75.

In Holder vs. Aultman, 169 U. S. 89, it was held: "A contract is made when and not before it has been executed or accepted by both parties, so as to become binding on both." In that case the contract was held to be an Ohio contract, simply because of an express stipulation therein that it was not to be valid unless approved in Ohio.

We submit that the contract was closed in Tennessee when the notes and mortgage were executed in that State and given to the association's agent therein, and the validity thereof is to be determined by Tennessee law. A contract illegal where made cannot be made good merely because it is payable elsewhere.

The case of Scudder vs. Union National Bank is in point. It was a suit in Illinois on a draft drawn and accepted in Illinois on a firm in Missouri, the draft being payable in Missouri. The contract was an invalid contract under the law of Missouri, but valid under the law of Illinois. The question presented was whether the law of Illinois, the place of contract, or the law of Missouri, the place of performance, should govern. The Court said: "Matters bearing upon the execution, the interpretation and the validity of a contract are determined by the law of the place where the contract is made. Matters connected with the performance are regulated by the law prevailing at the place of performance.

"Matters respecting the remedy, such as the bringing of suits, admissability of evidence, statutes of limitation, depend upon the law of the place where the suit is brought."

Scudder vs. Union National Bank, 91 U. S., 412, 413.

A citizen in Illinois borrowed money from a Connecticut corporation, making notes payable in New York, secured by a mortgage on land in Illinois. Under the law of New York the contract was void for usury, while under the law of Illinois the principal and ten per cent. could be recovered. The Court held the contract was governed by the Illinois law, as it was made in Illinois and secured by mortgage in Illinois, thus following the rule in Scudder vs. the Union National Bank.

Fowler vs. Eq. Tr. Co., 141 U. S., 384.

The case of Tilden vs. Blair also lays down the rule here contended for. That was a suit in New York on a draft drawn in Illinois on parties in New York, and expressly payable in New York. The court held that the contract was governed by the law of Illinois, the place where the contract was made. The court held that though the acceptance was made in New York, it must be considered as made in Illinois, as the draft was sent back there to be negotiated and "there was no operative acceptance until the draft was negotiated." The court said: "Nor is the law of the contract changed by the

fact that the acceptance was made payable in New York—the place of payment was doubtless determined for the convenience of or the facility and negotiation of the draft."

Tilden vs. Blair, 21 Wall, 246, 247.

The court held that sending the bill to Illinois to be negotiated was exactly as if the defendant had accepted the draft in Illinois, and that he had a right to make an Illinois contract, and had done so.

21 Wall, 247.

The rule that contracts to be performed in another State are sometimes supposed to be valid as entered into with a view to the law of such State is subject to the exception "that where a contract is declared void by the law of the State or country where it is made it cannot be enforced as a valid contract," though it would have been valid in the State where it was to be performed.

Hyde vs. Goodnow, 3 N. Y., 269.

In Liverpool and G. W. Steam Co. vs. Phoenix Ins. Co., 129 U. S., 397, it was held that a contract of affreightment made in an American port by an American shipper with an English steamship company, doing business there for the shipment of goods there, and their carriage to and delivery in England, where the freight was payable in English currency, was an American contract, although the contract exempt[ed] the parties from negligence. This exemption was valid under English law, but invalid under American law. The loss was occasioned by the vessel going ashore upon the coast of Great Britain. The court, in this case, examines a great number of authoritie and (129 U. S., 453) says the rule is: "That contracts are to be governed as to their nature, their validity and their interpretation by the law of the place where they are made, unless the contracting parties clearly appear to have had some other law in view." The court held (pp. 458, 459) that the parties did not, on making the contract, have in view the law of England, though the carrier was an English company and the goods were to be carried to England and the freight to be paid in English money. The parties were held to be governed by American law, although that law made the contract of exemption void, which was good under English law. The court (p. 462) did not determine what would have been the effect if the contract had expressly provided that the law of England should govern. This case clearly and distinctly holds that if the parties can avoid the law of the place where the contract it made that it has to be done in express terms and by express contract. On page 458 the court said the law of the place where the contract was made governs, "unless the parties, when entering into the contract, clearly

manifest a mutual intention that it should be governed by the law of some other country." (See also United States vs. North Carolina, 136 U. S., 222.)

In the case of London Assurance Company vs. Companhia De-Moagens, 167 U. S., 161, the court held the parties had expressly contracted with a view to English law, and said this could be done *"so long as in a case like this the foreign law is not "in any way contrary to the policy of our own. See Liverpool "and G. W. S. Co. vs. Phoenix Ins. Co., 129 U. S., 397, 446, 453."*

Clearly Bedford in the present case had no intention that the contract should be governed by the law of some other place than the one where he executed it. He never had any direct communication with the Eastern Building and Loan Association. He found it doing business in Tennessee, and all of his commuications with it were through its agents in Tennessee. He merely in Tennessee executed notes promising to pay in New York; but, as a matter of fact, he paid in Tennessee. He had the privilege of paying in Tennessee. (Record, 63 (4.) He did not contract with a view to or agree to be bound by any law except that of Tennessee. On the other hand, the Eastern Building and Loan Association were doing business in Tennessee and had the papers executed there, as a part of such business, and the record shows that, conceiving Tennessee law would govern the association, sought legal advice in Tennessee as to its rights under Tennessee law to loan money in Tennessee, after the passage of the Tennessee laws (Record, pp. 91-92), and acted on this advice. If any demonstration was needed, the fact that this advice was asked and acted upon demonstrates that the Eastern Building and Loan Association never intended to contract with a view to New York law, but that it recognized Tennessee law applied to all contracts as to loans in Tennessee.

It has been repeatedly held that "when the language of a contract is ambiguous the practical interpretation of it by the parties is entitled to great if not controlling influence."

Topliff vs. Topliff, 122 U. S., 121.
Chicago vs. Sheldon, 9 Wall, 50.
Lawler vs. Bangs, 2 Wall, 728.
R. R. vs. Trimble, 10 Wall, 367.
Steinbach vs. Stewart, 11 Wall., 576.
Coghlan vs. R. R., 142 U. S., 113.

The admission of the bill herin (Record, p. 4) that the association was "doing business" in Tennessee when the loans were made, is also a practical construction of its own acts by the association.

"An admission by the pleadings cannot be contradicted by the evidence, and is conclusive. (Van Dyke vs. Maguire, 57

N. Y., 431.) That which the parties have agreed to in their pleadings shall be admitted, though the jury find otherwise."

7 Bacon's Abridgement, 459.

McFarren vs. Taylor, 3 Cranch, 270, and note to same.

Book 2, Lawyer's Co-Operative Pub. Co., Edition Sup. Ct., U. S. Reports, 436.

In Horn Silver Mining Co. vs. New York, 143 U. S., 315, the admission in the answer that the corporation was doing business in New York was held conclusive.

The claim in the answer that the business was "lawfully" done (Record, p.), is, of course, a mere legal deduction that the Eastern Building and Loan Association cannot make for itself in its own case.

Rodgers vs. Rodgers, 6 Heiskell (Tenn.), 495.

There is nothing in the case of Coghlan vs. R. R., 142 U. S., 101, inconsistent with anything advanced in this brief. That case refers to Liverpool, Etc., Co. vs. Phoenix Insurance Company, and Trust Co. vs. Fowler, before cited approvingly (142 U. S., 110-112). Coghlan vs. R. R. merely held that when bonds were payable in England that the rate of interest after maturity was governed by the law of England and not of South Carolina. It will be observed that the English rate was less than that of South Carolina, and therefore the English rate was legal in both countries. It has been often held that parties who are allowed to contract in a certain country can make their obligations payable in another country, and can contract to pay the interest as allowed by such country. Coghlan vs. R. R. merely affirms this common doctrine. This case (142 U. S., 112) also explains the case of Tilden vs. Blair and Eq. Tr. Co. vs. Fowler, hereinbefore cited, and shows that the decisions in those cases were to some extent based on an Illinois statute providing that where Illinois contracts were payable in other States that the Illinois law might prevail. The Court in Coghlan vs. R. R., 142 U. S., 111, recognizes the general rule "that the lex loci contractus determines the nature and legal quality of the act done, whether it constitutes a contract," etc. The Court adds: "But a contract made in one country may contemplate the execution of deeds or other contracts, making payments or doing other legal acts in another, in regard to which the law of the foreign country where the act is to be done will govern the contract." The Court recognizes the doctrine "that the law of the country where a contract merely personal is made determines its validity." The Court says (142 U. S., 109): "All the terms of the contract must be examined in connection with the attendant circumstances to ascertain what law was in view of the parties when the contract was exe-

cuted." The Court was referring in this to the consequences of non-payment in England as to what rate of interest would govern. The Court was not referring to the validity of the antecedent contract made in South Carolina, and which had to be determined by the law of South Carolina, but simply to the performance or consequences of non-performance, thus offering, Scudder vs. Bank, supra.

Neither is there anything in the case of Pritchard vs. Norton, 106 U. S., 124, inconsistent with anything advanced in this brief. In that case the Court (106 U. S., 136) says: "The law we are in search of which is to decide the nature, interpretation and validity of the engagement in question is that which the parties have either expressly or presumptively incorporated into their contract as constituting its 'obligation.'" The Court then (page 138) sets out all the facts leading up to the conclusion that the parties intended to contract with a view to the law of Louisiana. It will be observed that this contract was in relation to things that had taken place and would take place in Louisiana. It was essentially a Louisiana transaction throughout, and no claim could be made that there was any evasion of New York law. Everything leading up to the contract had been done in Louisiana, and what was to be done thereafter was to reimburse the party in Louisiana for what he had done there. The case before the Court is not similar to Pritchard vs. Norton. In the present case the Eastern Building and Loan Association was confeddely doing business in Tennessee, and the notes and mortgages were executed in Tennessee to it, as a part of such general business. The laws of Tennessee forbid this business, and contracts made in that forbidden business are necessarily void. It is simply an evasion of law to claim that such contracts are good when made in Tennessee, if they are payable elsewhere.

It will be observed that in all of the cases where the parties in one State were allowed to contract with reference to the law of some other State, that it was not in relation to or growing out of business done in the former State, but was in relation to lawful acts, which could be performed in the latter State. In such cases there was no evasion of State law, and the contracts in question were not the outgrowth of any business forbidden in the former State.

The fact that notes are executed in one State, payable in another, even if no prohibitory law existed, does not indicate that the law of the State where payable governs.

To contend that it does, where the business in which such notes are given is prohibited by the law of the State where the notes are executed, sanctions an evasion of that law.

Where the contract "is invalid or void by the law of the

country where it is made" it will not be enforced, though payable elsewhere.

Pope vs. Nickerson, 3 Story, 484.

In Andrews vs. Pond the place of payment was disregarded as the transaction was illegal in the place where the draft was drawn.

Andrews vs. Pond, 13 Peters, 77, 78.

"The law of the place of payment does not necessarily govern the rate of interest which may be contended for."

Vleit vs. Camp, 13 Wis., 198.

A loan is an Alabama contract when the application is made, the money paid over to the borrower, and the notes and mortgage executed in that State, although the debt is made payable in New York, and the money was sent from that State to the mortgagee's agent in Alabama to be paid over on the execution of the paper."

Am. F. L. M. Co. vs. Sewall, 13 L. R. A., 299; 92 Ala., 163.

Where a policy issued in New York and the premiums were payable there, it was yet held to be a Missouri contract, subject to Missouri law, which it attempted to evade.

Eq. L. Ins. Co. vs. Clements, 140 U. S., 226.

In this case the provision in the policy, though it was issued in New York (page 234) was characterized as on "ineffectual attempt to evade and nullify the clear words of the statute" of Missouri

A soliciting agent in Missouri forwarded an application for insurance to New York, and the insured agreed that the policy was to be construed "according to the laws of the State of New York." The State of Missouri had passed certain laws as to the liability under policies. The Court held that the law of Missouri governed, notwithstanding the interstate character of the transaction and the contract of the parties, and that the power of the State over foreign corporations was not less its power over domestic ones.

New York Life Ins. Co. vs. Cravens, U. S., page —, decided by Supreme Court of U. S., May 28, 1900.

A loan was made on Arkansas land and the notes were payable in New York. The Court held it was an attempted evasion of Arkansas law and administered that law.

Banks vs. Flint (Ark.), 10 L. R. A., 460. 54 Ark., 40.

A similar case is Thompson vs. Edwards, 85 Ind., 414

Notes were executed in Georgia, payable in New York; held, validity thereof must be determined by Georgia law

Banks vs. R. R., 2 Lea (Tenn.), 679.

"The law of the State in which a note for money loaned is given governs on the question of usury, where it is secured by

a deed of land located in the State and part of the money representing the usury was deducted from the loan and never paid over to the borrower, although the note is expressly made payable in another State."

Martin vs. Johnson (Ga), 8 L. R. A., 170, 84 Ga., 481.

In United State Savings and Loan Association vs. Scott (Ky.) 34 S. W. Rep., 236 (98 Ky., 695) it was held a foreign building and loan association doing business in Tennessee could charge no higher rate of interest than was chargeable under Kentucky law. The Court held any higher charge of interest was an attempted evasion of the Kentucky law, "and this though it be specifically provided that the contract is made with reference to the laws of the foreign State. Such provision only make the intent to evade the more manifest." In this case a resident of Kentucky became a member of a Minnesota corporation and borrowed money secured by a mortgage on Kentucky land. The note was both dated and payable in Minnesota, and said: "This note is understood to be made with reference to and under the laws of the State of Minnesota."

See also Pierce vs. People, 106 Ill., 22, 23.

In the case of Andrews vs. Pond, 13 Peters, 77, 78, before referred to, the draft in question contained usury and was payable in Alabama, under New York law, the transaction was void, but under Alabama law the principal could be recovered. The suit was brought in Alabama and the Court held the New York law applied, saying (23 Peters, 78): "A contract of this kind cannot stand on the same principles with a *bona fide* agreement made in one place to be executed in another. In the last mentioned cases the agreements were permitted by the *lex loci* contractors and will be enforced there if the party is found within its jurisdiction. But the same rule cannot be applied to contracts forbidden by its laws and designed to evade them. In such cases the legal consequences of such an agreement must be decided by the law of the place where the contract was made. If void there, it is void everywhere, and the cases referred to in Story's Conflict of Laws, 203, fully establish this doctrine."

The Eastern Building and Loan Association could not carry on business in Tennessee asd evade the Tennessee law in respect thereto by taking notes payable elsewhere.

The fact that the Eastern Building and Loan Association construed the Tennessee law wrongly cannot aid it. It was bound to know the law. The situs of the contract cannot be affected by the ignorance or knowledge of the association. If the association thought this business legal, that simply shows it thought and intended the contract to be a Tennessee con-

tract; but if it intended otherwise that would be an atttempted evasion of the Tennessee law. The fact that the association was mistaken as to its construction of Tennessee law cannot make it a New York contract. To claim that Tennessee law does not apply is simply to attempt an *ex post facto* evasion of such law.

The legality of a contract made in Missouri, as to lottery tickets, was held to be governed by the law of that State, though the lottery was located elsewhere.

Russell vs. McAuliff, 141 Mo., 40.
35 S. W. Rep., 1135.

The cerificate of the Circuit Court of Appeals herein calls the agents of the Eastern Building and Loan Association in Tennessee "soliciting agents." No matter how limited their authority was, the association carried on business in Tennessee through them, and brought about the very business in controversy. Where these agents are sought to be disconnected from their principal it would appear to be an attempt to evade Tennessee law. They did not represest Bedford, and the bill (Record, p. 1) admits the association carried on business in Tennessee.

Any claim on behalf of the association based on the idea that the agents of the association were soliciting agents would seem to be like the unavailing attempts of corporations to make their own agents the agents of the parties they transact business with. In this connection see:

N. Y. L. Ins. Co. vs Russell, 77 F. R., 103, 104, citing many authorities.

In that case the Court (p. 104) says the design of the attempts to limit the authority of agents "is to enable the insurance company to escape from the necessary obligations and liabilities imposed by the law of agency on a principal who commits the conduct of his business to an agent."

In considering this first question propounded by the United States Circuit Court of Appeals, it should be remembered that while the notes were on their face payable in New York, that as a matter of fact they were allowed to be, and were paid in Tennessee to the local treasurer of the association. These payments were authorized to be so made by the charter of the association and its by-laws. The law is plain that such local treasurer and the other agencies of the association were its agents, and that they cannot in any sense be considered as Bedford's agents, though the charter and by-laws should attempt to make them such.

Knights of Pythias vs. Withers, 177 U. S., 261.
Murphy vs. I. O. S. & D. of Jacob, 27 So. Rep., 624.

It is competent for the Legislature to provide a penalty

against any agent of a foreign insurance company who shall act without authority from the State, although the contract is made out of the State, and provides that he shall be deemed the agent of the insured.

Pierce vs. People, 106 Ill., 11, 46 Am. Rep., 683.

In the above case the court said (46 Am. Rep., 688): "It may "be admitted that it was incompetent for the Legislature in "endeavoring to accomplish this object to say that a citizen of "this State should not make a contract with a foreign com- "pany not having the right to do business here for the insur- "ance of property in this State, yet the Legislature in such "case would clearly have the power to declare all such con- "tracts void when sought to be enforced here on the ground "that they are contrary to the public policy of the State."

Acts providing no action shall be brought for liquors sold in other States with intent to enable one to violate law are not unconstitutional, though the sales were valid by law of that State where made.

Reynolds vs. Geary, 26 Conn., 179.
Davis vs. Branson, 6 Iowa (6 Clark), 425.
Barrett vs. Delano (Me.), 14 Atl. Rep., 248.
See also Wooten vs. Miller, 7 S. and M. (Miss.), 380.

When the Eastern Building and Loan Association admits, as it did, in its bill (Record, p. 2), that it carried on business in Tennessee, and then claims that its agents had little authority, it is a plain attempt to evade Tennessee law.

In 1887 the Legislature of the State of Tennessee passed a law as to foreign corporations, the same being chapter 226 of the acts of 1887. Section 2 of this act says: "Be it further enacted, That any corporation having any transactions with persons, or having any transactions concerning any property situated in this State, through any agency whatever acting for it within the State, shall be held to be doing business here within the meaning of this act."

This act (Ch. 226 of 1887) was held to be valid by the Supreme Court of Tennessee in 1889 in the case of Telephone Co. vs. Turner, 88 Tenn., 226.

The case of Life Ins. Co. vs. Spratly, 99 Tenn., 322, also construed this statute. This act provided that transactions "through any agency whatever acting for it" constituted doing business in Tennessee. This decision was affirmed by the Supreme Court of the United States January 30, 1899. Conn. M. L. Ins. Co. vs. Spratly, 172 U. S., 611.

A contract of insurance on property in the State with a foreign insurance company, irrespective of where made, is an attempt to do business within the meaning of the statutes for-

bidding foreign corporations doing business within the State unless certain conditions are complied with.

Conn. M. F. I. Co. vs. Sharpless, 12 Pa., Super. Ct., 333.

It has been often held that parties cannot go out of a State to evade its law, and then claim the transaction outside of such State, was valid. This is true even as to marriages.

"The marriage in another State where it is lawful of a divorced man and his paramour, who go there to evade the law of their domicile, which prohibits their marriage during the life of the former wife, is not valid in the latter State."

Re. Stull, 183 Pa., 625; 39 L. R. A., 538.
Pennegar vs. State (Tenn.), 2 L. R. A., 703
State vs Tutty (Ga.), 7 L. R. A., 50.
3 Pickle (Tenn.), 244

A contract to marry made in Alabama, where it was illegal, to be performed in New York, where it was legal, was held void in New York

Campbell vs. Crampton, 2 F. R., 423.

The place of performance cannot be looked to where the object is to avoid the usury laws.

Parham vs. Pulliam, 5 Cold. (Tenn.), 506, 508, 509.
Mix. vs. Ins. Co., 11 Ind., 117.

One who agrees not to sell lumber nor interfere with the lumber business in a certain town cannot sell lumber there to be delivered in other places.

Eagle vs. Troup, 68 Ill. Apn. 302.
Bolton vs. Street, 3 Cold. (Tenn.), 506, 509.

Contracts which are lawful in the State where made may be criminal and not enforced in another State as against their policy.

Gooch vs. Faucette, 39 L. R. A. (N. C.), 835.
Pope vs. Hanke, 28 L. R. A., 568 (155 Ill, 617).
Ex Parte Lanv, 31 L. R. A., 822 (Va.)

It has often been held that where there is a doubt as to whether the law of the forum or the lex loci contractus should prevail, the former will always be given the preference.

2 Kent, Com., 461.
Story on Conflict of Laws, 326, 328.
Bank of Columbia vs. Walker, 14 Lea (Tenn.), 307.
Ramsey vs. Stevenson, 12 Am. Dec., 468, and note, 470.
Woods vs. Weeks, 7 Lea (Tenn.), 47.

In Endlich on Interpretation of Statutes the subject of evasion of statutes is treated of in sections 138 to 145. These sections show numerous fruitless attempts to evade law, and show clearly that the form of the transaction is disregarded.

An amusing case is mentioned by Mr. Endlich in section

144, where he says: "A beer shop keeper who is licensed to sell beer only to be drunk off the premises evades the act if he sells beer to be drunk on a bench which he provides for his customers, close t ohis shop, the intention making it substantially and in effect a sale for consumption on the premises," citing authorities.

Where the Eastern Building and Loan Association did business in Tennessee and had notes executed to it there the invitation by it to its customer to pay in New York would seem to be as plain an evasion of Tennessee law as the use of the bench in the beer shop case. The corporation in effect said to its customer: We will do the business in Tennessee, but you can walk out of or send out of the State to settle up.

In section 521 of his work Mr. Endlich says: "A constitutional provision as well as a statutory one is to receive such a construction as will frustrate attempts to evade its legitimate operation."

It is perfectly apparent that the Tennessee statutes on the subject of foreign corporations will be practically repealed or destroyed if it be held that their provisions are not applicable where notes are executed in Tennessee payable in a foreign State, no matter whether the contract be considered as concluded when the notes are executed in Tennessee, or when they arrive in the foreign State and are accepted there. No forign corporation carrying on a general business in Tennessee will subject itself to the pains and penalties of the Tennessee law when they can be evaded by the mere form in which the contracts are made. The view that this cannot be done is fully sustained by Hooper vs. California, 155 U. S., 658, where the court said: "If the contention of the plaintiff in error were admitted, the established authority of the State to prevent a foreign corporation from carrying on business within its limits, either absolutely or except upon certain conditions, would be destroyed. It would only be necessary for such a corporation to have an understanding with a resident, that in the effecting of contracts between itself and other residents of the State, he should be considered the agent of the insured persons, and not of the company. This would make the exercise of a substantial and valuable power by a State government depend, not on the actual facts of the transaction over which it lawfully seeks to extend its control, but upon the disposition of a corporation to resort to a mere subterfuge in order to evade obligations imposed upon it. Public policy forbids a construction of the law which leads to such a result, unless logically unavoidable."

Where contracts are prohibited by statute "the illegality of the contract cannot be purged by crossing a boundary line

to solemnize it." The subjects of a State cannot evade its laws in this manner.

Sec. 696, Wharton on Conflict of Laws.

Contracts made outside of a State to smuggle goods into it will not be enforced, whether the parties are citizens or foreigners.

Sec. 246, Story on Conflict of Laws.

The State of Tennessee had complete control of Bedford, its citizen, and could prevent him making any contract that would practically be an evasion of its laws. The State of Tennessee likewise had complete control of the Eastern Building and Loan Association, which was doing business therein, and could prevent its evasion of the State laws as to the transaction of such business.

If the view we submit be not correct, then no State practically can legislate against foreign corporations or impose terms thereon as to carrying on business in such State. These corporations would all do exactly as the Eastern Building and Loan Association did; that is, carry on their business in such State, though forbidden by law, and evade the provisions of such law by taking notes payable outside of such State.

In this view it would not make a particle of difference whether the contracts made in this general business carried on in Tennnessee by the foreign corporations were closed by the giving of notes, executed in Tennnessee, payable in the foreign State, or by the acceptance of such notes when they were sent on to such foreign State. In either view the foreign corporations carry on the business in Tennessee, get the benefit thereof, and ignore the Tennessee law completely, unless they choose to obey it.

We have shown, as we think, that the contract was closed in Tennessee, and that it is immaterial that the notes are payable in New York.

In Miller vs. Tiffany, 1 Wall, 310, speaking in reference to the right of parties to have contracts governed by the law of the place of performance, it is said, "These rules are subject "to the qualification that the parties act in good faith, and "that the form of the transaction is not adopted to disguise "its real character. The validity of the contract is determined "by the law of the place where it is entered into. Whether void or valid there, it is everywhere."

We submit further, that if the contract was closed in New York, that the same rules exactly apply as we have hereinbefore contended for.

It appears that the Eastern Building and Loan Association carried on a general business in Tennessee, and that all of its loans were made precisely in the same manner. We sub-

mit that where a foreign corporation has its agents in Tennessee, who assist it in getting up business there, and where such business is carried on in Tennessee, that even if the contracts procured in such business be technically closed outside of Tennessee, that where the business is forbidden by Tennessee law, it is an evasion of that law to claim that it is not applicable.

In the case of Allgeyer vs. Louisiana, 165 U. S., 587, the court quotes approvingly: "The fourteenth amendment, however, does not guarantee the citizen the right to make within his State, either directly or indirectly, a contract the making whereof is constitutionally forbidden by the State." Can a corporation carrying on business in a State "indirectly" evade its laws against such business by the mere form of all its contracts taken therein?

In Holden vs. Hardy, 169 U. S., 391, the court refers to Allgeyer vs. Louisiana, and says: "This right of contract, "however, is itself subject to certain limitations which the "State may lawfully impose in the exercise of its public pow- "ers."

In U. S. vs. Joint Traffic Association, 171 U. S., 572, 573, the court said: "Notwithstanding the general liberty of contract "which is possessed by the citizen under the constitution, we "find that there are many kinds of contracts which, while "not in themselves immoral or *mala in se*, may yet be pro- "hibited by the legislation of the States or in certain cases "by Congress."

This court further held that the agreement in question was not the less illegal because the rates fixed were reasonable and that "the effect upon interstate commerce must not be in- "direct or incidental only."

See also Addystone Pipe and Steel Company vs. U. S., 175 U. S., 211, where it was held the citizen could not enter into contracts which "would, if performed, result in the regulation of interstate commerce."

Now, it is apparent that the power of the States within their sphere is equally as great as that of Congress within its sphere, and that proper legislation, whether by the one or the other, cannot be evaded by the mere form of the contract. It is the result that is looked to.

In Allgeyer vs. Louisiana, 165 U. S., 579, there was no question of evasion of law. The contract therein was made in New York, and the insurance company had no agents in Louisiana, and was not doing business there. This case further refers to Hooper vs. California, 155 U. S., 618, approvingly, which case we rely upon as authority herein.

The agreed statement of facts (Record, pp. 90-92) shows in

substance that many loans were made by the complainant, not only in Shelby County, but also in other counties in the State of Tennessee, both before and after the passage of the acts of the Tennessee Legislature under consideration. "That the complainants *furnished its agents in Shelby County, Tennessee*, with printed blanks to be used in effecting loans and other transactions with parties in Tennessee." The application for charters, the applications for loans and the appraisers' report and affidavits of appraisers and applicant, the application for advances, were all upon blanks furnished by the association. (See Record, pp. 82-83.)

It can be safely said that everything that was done in this matter was done and performed by the parties in Shelby County, State of Tennessee, except the mere formal function of adoption by the association at its home office in New York, the recommendation and the report of the agent at Memphis, Tennessee.

We therefore submit, without argument, that no amount of paraphrasing and no argument or subterfuge can hide or conceal the fact, first, that the complainant had a regularly constituted agency in Shelby County, Tennessee; and, second, that this agency performed in pursuance of its regularly constituted authority all the acts and functions that were necessary to be performed and which *were conditions precedent* to the granting of the loan.

The evidence not only shows that "all of the verbal acts of the parties were done and performed" in Tennessee" (this is the expression of the Court in Allgeyer's case, 165 U. S., 587, to the point that if when true the statute applies) but that the complainant had a regularly constituted agency in Tennessee, and was not only prepared to, but actually did do "a regular land office business" in the State. Many loans were made in the State, and the business it did in Tennessee was the business it did, or was possible for it to do, in that or in any other State. *If the complainant was not doing business in Tennessee, then it was impossible for it to do business in any State, other than that of its creation, because it carried on in Tennessee the business for which, under its charter, the corporation was created.* It is unnecessary to enter into an analytical discussion of what is necessary to constitute the "doing of business," as that question has been so frequently passed upon by the courts as to be no longer an open question. The question in all cases is simply the construction and interpretation of the statute, and the now generally accepted construction is the one found in Thompson on Corporations, Vol. 6, Sec. 7936, to-wit:

"The general conclusion of the courts is that isolated transactions, commercial or otherwise, taking place between a for-

eign corporation, domiciled in one State, and citizens of another State, are not doing or carrying on of business by the foreign corporation, within the latter State, but that these prohibitions are leveled against the act of foreign corporations entering the domestic State by their agents and engaging in the *general prosecution of their ordinary business therein.*"

Continuing, this author says, in the same section, "but where the constitutional provision was against 'doing *any* business in this State' without complying with the specific conditions, it was held that the doing of a *single act* of business if it be in the exercise of a corporate function, was as much prohibited as the doing of a hundred such acts, and was just as much opposed to the policy of the Constitution, which was to protect the domestic citizens against the fraud and imposition of insolvents and unreliable corporations, and to place them in an attitude to be reached by legal process in domestic courts. The making of a *single loan secured* by mortgage, by a corporation which had not complied with the conditions, was, therefore, within the prohibition, in such a sense that an action to foreclose the mortgage could not be maintained in the domestic courts."

Thompson on Corp., Vol. 6, Sec. 7936.
State vs. U. S. Bank, 108 Ala., 3.

Now, our contention is that complainant had not complied with any of the statutes under consideration. Sec. 3 of Chap. 122 of the law of 1891 provides that, "It shall be unlawful for any foreign corporation to do or attempt to do *any* business." Consequently it follows, under the rules laid down by Mr. Thompson, *supra*, that the doing of a single act of business is a violation of this statute. Cooper M. Co. vs. Ferguson, 113 U. S., 734, is no answer to this, as the Colorado statute provided that the corporation should have one or more known places of business, and the court held that this implied a purpose at least, to do more than one act of business (page 734). The building and loan act, Ch. 2, of the Acts of 1891, Sec. 3, provides that, "every building and loan association organized under the laws of any State, territory or foreign government, shall, *before commencing to do business within this State, file with the Treasurer of this State a* "copy of its charter, and second, file with the Treasurer of this State certain securities." How can it be seriously argued that the complainant has not violated both of the acts under consideration is absolutely incomprehensible. To use the expression, *supra* of Mr. Thompson, the complainant corporation was "engaging in the general prosecution of its ordinary business therein." The contract sought to be enforced in Cooper M. Co. vs. Ferguson, 113 U. S., and Holder vs. Aultman, 169 U. S., were declared valid, sim-

ply because they were not in violation of the statute then under consideration, and both of the above authorities sustain the contention of appellants herein.

It was not necessary that the Eastern Building and Loan Association should have either a dimicile or an office in Tennessee, in order to carry on business there. This was expressly so decided in Myers vs. Wetzel, 35 S. W. Rep. (Tenn.), 896.

See also Turcott vs. Yazoo, etc., R. R,, 45 S. W. Rep., 1068, 101 Tenn., 102.

Section 2 of Chapter 226 of Acts of Tennesse defined what was "doing business" in Tennessee by foreign corporations not domiciled or having offices in Tennessee. "Any transaction," "through any agency whatever," in Tennessee under this act was doing business in Tennessee. This act was held valid by the Supreme Court of Tennessee in Telephone Co. vs. Turner, 12 S. W. Rep., 544, 88 Tenn., 266, and Ins. Co. vs. Spratly, 99 Tenn., 322. The last case was affirmed by the Supreme Court of the United States January 30, 1899.

Corporations may carry on business at places where process could not be served on them. This is distinctly recognized in—

Shields vs. R. R., 7 Jur. (N. S.), 631.

Mackareth vs. R. R., L. R. 8, Exchequer, 149.

Watkins vs. Scottish Co., 23 Q. B. Div., 285.

In Z. Co. vs. Harris (Tex.), 35 S. W. Rep., 403, the business was carried on by soliciting agents.

"There is no sound reason why in the case of an insurance company doing business in another State by an agent under statutes such as those referred to in the principal cases it should not be deemed to be represented in the latter by such agent and held responsible for its obligations and liabilities therein incurred."

Talbot vs. F. & C. Co., 13 L. R. A., 586, note.

Where agents of the company received and forwarded applications to the company who issued policies and sent them to the agent, that was doing business in the State.

Berry vs. Knights, 46 F. R., 439.

Eq. L. A. Society vs. Winning, 58 F. R., 541.

M. B. I. Ins Co. vs. Robinson, 54 F. R., 581

Knights vs Berry, 50 F. R., 511.

Where an insurance company took notes in a State it was held to be doing business therein.

Hardeny vs. Leary, 12 Oregon, 44.

In Bloom vs. Richards, 2 Ohio St., 399, Judge Thurman said, after reviewing numerous authorities: "It thus seems to be the common expression of the courts that the making of a contract is business within the meaning of the acts."

See numerous cases cited as to "doing business" in note to 14 L. R. A., 530, 531, 532.

In Connecticut Life Ins. Co. vs. Spratly, 172 U. S., 602, it was held that an insurance company was still doing business in Tennessee, though it had withdrawn and was taking no new risks, but merely collecting premiums on old policies.

Receiving payments on stock loans made before the prohibitory act is carrying on business.

Ed. L. & I. Assn. vs. Peed, 52 N. E. Rep., 201.

If we were to concede that the contracts in question were valid in the State of New York, the situs of the Eastern Building and Loan Association, it would make no difference. The question is whether such contract can be enforced in Tennessee. It is against the policy of the Tennessee laws, and is void thereunder.

Now, it is elementary law that a foreign corporation has no right per se to demand that courts of States foreign to it shall enforce its contracts. The right to have such contracts enforced in such courts springs from and is entirely dependent upon the doctrine of the comity of the States. Such comity will not be applied in favor of the foreign corporation, where the contract sought to be enforced is against the policy of the State, and where it is forbidden by the law of such State.

The authorities show that where the contracts sought to be enforced were made in the State of the creation of the corporation and were valid under these laws, and were valid under the laws where they were to be performed, but were invalid by the lex fori, that they could not be enforced within the latter jurisdiction.

Seamans vs. Temple Co., 105 Mich., 400 (28 L. R. A., 430).
People, Etc., Society vs. Lester, 105 Mich., 716.
Cowan vs. London Ins. Co., 73 Miss., 321.
Rose vs. Kimberly, 89 Wis., 544 (27 L. R. A., 556).
Warsserboehr vs. Boulier, 84 Maine, 163.
Grover, Etc. Co. vs. Ratcliffe, 137 U. S., 299.
Cooper Mfg. Co. vs. Ferguson, 113 U. S., 733.

Seamans vs. Temple Co., 105 Mich., 400, was a suit by a corporation which had failed to comply with the law of Michigan in obtaining license to do business in that State upon a note given by one of its members for a premium upon insurance. The Court said in its decision: "If it be conceded that the contract was made in Wisconsin, and that the premiums and losses, if any, are payable there, it is as much in contravention of the policy of this State as though it had been made and was to be performed here. It cannot be supposed that the statutes cited were intended merely to prevent the act of making the

contract in this State. * * * Argument of counsel is substantially this: 'We have made our contract through the mail, and we have committed no violation of the Michigan statute, because we have done nothing upon Michigan soil. We have evaded your law and obtained a contract which you have sought to prohibit, and now we ask you to enforce it, for we are under the doctrine of State comity.'

"Under such circumstances the courts of the State are not open to the offending company, and the rule of State comity cannot be evoked in its behalf."

The above case was referred to approvingly in Holder vs. Aultman, 169 U. S., 91, 92.

In Cowan vs. London Ins. Co., 73 Miss., 321, the suit was brought by a foreign corporation against a citizen of Mississippi to recover premiums due on a policy of insurance on property situated in Mississippi. The contract of insurance was made in New York. The corporation had not complied with the laws of Mississippi relating to foreign corporations. The Mississippi Court said:

"We have held, and we think correctly, that a contract made in New York by a citizen of this State with a foreign insurance company, which has not complied with our laws, insuring property in this State, is a violation by such company of our statute, and hence that our courts are closed against such companies, seeking to enforce any right springing out of or resting on the contract; that the insurance company is in such a case taking a risk to transact business in this State."

In Rose vs. Kimberly, 89 Wis., 544 (27 L. R. A., 556), it was held that a contract made by mail for insurance of property within the State by a foreign company which is prohibited from transacting business within the State, would not be enforced. The Court (27 L. R. A., 557), said:

"The object of this statute is so plain that it cannot be mistaken. It is to protect our citizens against irresponsible and worthless foreign corporations of the very kind which we have now before us. The evil to be corrected is not the writing of a policy by an unlicensed company within this State alone, but the writing of such a policy at all. Bearing in mind the object of the statute and the evil to be corrected, it is very plain that the object will be largely defeated, and the evil will flourish as before, if it be held that companies without license can establish their agencies just outside of the State line and conduct their business by mail. * * * The writing of a policy of insurance upon property situated within this State would seem pretty clearly to be in some degree at least the transaction of insurance business in this State, whether the policy be written just within or just without the State line. It was said

in Stanhilber vs. Mutual M. Ins. Co., 76 Wis., 285, on page 291: 'A contract insuring property in this State necessarily involves the doing of business in this State, and herein subject to the laws of this State.' "

In Cooper M. Co. vs. Ferguson, 113 U. S., 733, the Court said:

"It must be conceded that if the contract on which the suit was brought was made in violation of the law of the State, it cannot be enforced in any court sitting in the State, charged with the interpretation and enforcement of its laws."

In Grover, Etc. M. Co. vs. Ratcliff, 137 U. S., 299, the Court said:

"The courts of Maryland were not bound to hold this judgment as obligatory, either on the ground of comity or of duty, thereby permitting the law of another State to override their own."

In a note to Gist vs. W. U. T. Co., 55 American State Reports, 774, the annotator, after stating that a ocntract valid where made is generally valid everywhere, says:

"But this rule is subject to the exception that no nation or State is bound to recognize or enforce contracts made elsewhere, which are injurious to its own citizens or subjects. The enforcement by one nation or State of contracts made under the laws of another, rests on principles of comity which cannot be so far extended as to violate the public policy or positive legislation of the former," referring to—

Gallamo vs. Pierce, 18 La., Ann, 10.
Smith vs. Godfrey, 28 N. H., 379.
Thirston vs. Rosenfield, 42 Mo., 474.
McLean vs. Hardy, 3 Jones Eq., 294.
Swan vs. Swan, 21 Fed. Rep., 299.

The same annotater continues:

"The only general rule that can be laid down is that contracts and liabilities recognized as valid by the laws of the State where made or established may be enforced in the courts of another State where the action is brought, unless contrary to morals, public policy or to positive law of the latter, in which event they will generally not be enforced," referring to numerous authorities.

Seaman vs. Temple Co., 28 L. R. A., 432, also says the right of a foreign corporation to recover does not exist where the contract is "expressly prohibited by law,' or it "is one which is clearly at variance with the settled policy of the State."

To same effect is

Lewis vs. Woodfolk, 2 Baxter (Tenn.), 48, 49.

The rule is also recognized in Bank of Augusta vs. Earle,

13 Peters, 589, where the court quotes approvingly from Story's Conflict of Laws, saying:

"In the silence of any positive rule affirming or denying or restraining the operation of foreign laws, courts of justice presume the tacit adoption of them by their own government, unless they are repugnant to its policy or prejudicial to its interests. It is not the comity of the courts, but the comity of the nation, which is administered and ascertained in the same way, and guided by the same reasoning by which all other principles of municipal law are ascertained and guided."

Mr. Morawitz says: "It is not necessary in all cases that a State should by statute expressly exclude foreign corporations in order to indicate that they shall not be allowed to act within its jurisdiction; the will of the State may be implied from its general policy and legislation," referring to numerous authorities.

Section 965, 2d Morawitz on Private Corporations.

Mr. Story says: "And every independent community will and ought to judge for itself how far that comity ought to extend."

Sec. 244, Story, Conflict of Laws.

Now, it would seem from all of the foregoing that whether the contract in question between Bedford and the Eastern Building and Loan Association was technically made in Tennessee or made in New York, that the question whether it can be enforced in Tennessee is to be governed by Tennessee law. Under Tennessee law the contract is absolutely void, and in any event it was against the public policy of the State, as declared in its laws as to foreign corporations, and in the decisions of the courts construing such laws.

WHAT IS THE TENNESSEE LAW?

Let us now see what is the law of Tennessee, as proclaimed in the decisions of its courts construing the very statutes in question and similar statutes.

In Hale vs. Henderson, 4 Hump., 200 (Tenn.), decided in 1843, the Supreme Court of Tennessee said:

"No principle of law is better settled than that no action will lie to enforce a contract made in violation of a statute or of the common law, or which is immoral in its character, or against public policy."

In Ins. Co. vs. Ins. Co., 11 Hump., 11, decided in 1850, the Supreme Court of Tennessee said:

"Now, as to contracts which contravene the provisions of a statute, the objection of illegality is equally fatal, whether the prohibitions of the statute be expressed or implied, as when a statute does not in express terms prohibit a thing to be done, but only imposes a penalty on the person doing it;

any contract which contravenes this implied prohibition will be held illegal. * * * Whether the contract be *malum prohibitum or malum in se* seems not to be material, as in either case the courts will refuse to enforce it, and upon this reasoning, that there can be no civil right where there can be no legal remedy, and there can be no legal remedy for that which is itself illegal."

In Talmadge vs. N. A. C. and Tr. Co., 3 Head, 338 (decided in 1859), it was held that foreign corporations could only exercise rights in Tennessee by comity. The court, speaking of this comity, said: "If prejudicial to ourselves or our citizens, of which we must be the exclusive judges, we are under our obligation to give it effect."

In Perkins vs. Watkins, 2 Baxter, 187, decided in 1872, the Supreme Court of Tennessee said:

"When contracts are prohibited by statute the prohibition is sometimes expressed and at others implied. Whenever the law imposes a penalty for making a contract it impliedly forbids parties from making such a contract, and when a contract is prohibited, whether expressly or by implication, it is illegal and cannot be enforced; of this there is no doubt."

Haworth vs. Montgomery, 91 Tennessee, 16, decided November 17, 1891, construed a Tennessee statute of 1889, providing persons could not practice medicine without first procuring certain certificates. There was a penalty prescribed for practicing without a license. It was held that a physician who had not procured the necessary certificate could not recover for services. The Court said:

"Where a statute has for its manifest purpose the promotion of some object of public policy, and prohibits the carrying on of a profession, occupation, trade or business, except in compliance with the statute, a contract made in violation of such statute cannot be enforced."

This case further held that a compliance with the State statute made after the rendition of the services was unavailing, notwithstanding an act passed in 1891 extended the time of taking out the necessary certificates.

A subsequent compliance with the terms of a statute did not validate the previous contract.

Neuchatel Asphalt Co. vs. Mayor, etc., 9 Miss. (N. Y.), 376.

Blevins vs. Fairley, 71 Mo. App., 263

Knoxville Nursery Co. vs. Commonwealth (Ky.), 55 S. W. Rep., 691.

In 1888 the Supreme Court of Tennessee decided the case of Stevenson vs. Ewing, 87 Tenn., 46. That case construed an act of the Legislature of 1885 declaring the occupation of a

real estate broker "shall be deemed a privilege and not pursued or done without a license." The Court (87 Tenn., 47) said:

"Here is an express prohibition of all unlicensed persons to act as real estate brokers and consequently a prohibition by necessary inference of all contracts which such persons shall make for compensation to themselves for so acting." The Court (87 Tenn., 48) said:

"It is familiar law, both in England and America, that a contract prohibited either expressly or impliedly by statute is illegal and cannot be enforced." The rule is also laid down in this case (87 Tenn., 50) that where a statute has "in view in whole or in part the protection of the public from fraud in contracts or the promotion of some object of public policy * * * the inference is that the statute was intended to prohibit contracts."

These decisions of the Supreme Court of Tennessee plainly informed foreign corporations how the laws passed in 1891 by the Legislature of Tennessee would be construed, and since the passage of the statutes now under consideration the Tennessee courts have repeatedly held contracts void where the foreign corporation had not complied with such laws.

The certificate from the Circuit Court of Appeals herein (Record, p. 132) says: "The Supreme Court of Tennessee has decided that notes and a mortgage executed under similar circumstances and made payable in Minnesota are Minnesota contracts, but that they are nevertheless void in Tennessee and cannot be enforced in the courts of Tennessee."

U. S. Sav. and Loan Co. vs. Miller, 47 S. W., 17.

In Hamilton vs. Fowler, 99 F. R., 21, the Court said as to the Tennessee acts in question: "It is well established by the Tennessee decision that every contract made in the State by a foreign corporation doing business within the State, not having complied with the law is unenforceable as between the parties thereto," referring to the authorities. The Court adds: "These cases are in accord with a line of earlier decisions of the State, holding that every contract made in the conduct of a business which is prohibited and made unlawful is, by implication, void and unenforceable."

This case (Hamilton vs. Fowler) held the statutes did not cover the case of an innocent purchaser of a note taken in the illegal business, overlooking the late case of Bank vs. Coughram, 52 S. W., 112 (Tenn.) deciding to the contrary.

In Myers Mfg. Co. vs. Wetzel, 35 S.W. Rep., 896, the Supreme Court of Tennessee decided that the acts of the Legislature of Tennessee, Chapters 2, 95 and 122, were all in force and were all applicable to foreign building and loan associations. Under

Chapters 95 and 122 of said acts the Eastern Building and Loan Association was bound to file it charter with the Secretary of State of the State of Tennessee, and to cause an abstract of the same to be registered in the different counties where it carried on business. It never filed any such charter or registered any such abstracts thereof, until August, 1893.

Record, p. 91.

Under Chapter 2 of the Acts of 1891, the Eastern Building and Loan Association was obliged to deposit securities with the State Treasurer of Tennessee and to file a copy of its charter with him. None of the provisions of this act were ever complied with by said association.

Record, p. 91.

In Lumber Co. vs. Thomas, 92 Tennessee, 595, the Supreme Court of Tennessee passed upon Act, Chapter 122 of Acts of 1891, and held that the foreign corporation not having filed its charter with the State Treasurer, that all contracts were void.

In State vs. Phoenix Ins. Co., 92 Tenn., 432, the Court said as to Chapter 122 of Acts of 1891, that "the chief purpose of the act was not to confer new privileges, but to impose restrictions upon foreign corporations."

Contracts were held void where the acts in question had not been complied with by the foreign corporation in the following cases:

Myers Mfg. Co. vs. Wetzel, 35 S. W. Rep., 896.
Cumberland Co. vs. Canter, 35 S. W. Rep., 888.
N. H. Ins. Co. vs. Kennedy, 36 S. W. Rep., 710 (96 Tenn., 711).

The case of N. Y. N. B. & L. Association vs. Cannon, 41 S. W. Rep., 1055 (99 Tenn., 344), is directly in point. It was said therein by the Court:

"It is argued that Cannon having become a stockholder in the association before the acts were passed, with a view to becoming a borrower, and for that purpose, and having made his application for a loan likewise before the acts passed, acquired a vested right to the consummation of the loan, and the association became legally obligated to complete it, and it was also unfinished business which the association had a right and which it was its duty to finish, notwithstanding the acts of the Legislature. If we were to grant that the borrower had a vested right to the loan, and the association had a legal obligation to consummate it, still it must follow that the contract could be entered into and the loan and mortgage made only in compliance with the law. There was nothing to prevent the association from complying with the statutes, and thus placing itself in the attitude where it could legally make the loan and take the mortgage if it were under obligations to do so, as it

claims. We think it cannot be considered that the association and Cannon were winding up an old transaction and unfinished business, but the association, as found by the Court of Chancery Appeals, was entering into a new contract, and through a local board doing business in the sense prohibited by the statute, with full knowledge of it and in defiance of its prohibition. Under the findings of facts the Court of Chancery Appeals was correct in holding that the contract was illegal and could not be enforced, and in refusing to foreclose the mortgage of the building and loan association."

Lumber Co. vs. Thomas, 92 Tenn., 589.

Mfg Co. vs. Gorten, 93 Tenn., 597.

In the above case all the applications, including the one for loan, were addressed to the foreign corporation and passed through the hands of their Tennessee agents, and the notes and obligations were payable at the home office of the foreign corporation. The application for loan was made before the acts were passed. In the present case Bedford's application for loan must be considered as made May 5, 1891, or after the acts were passed.

It has often been held that where a contract was lawful when made, and afterward the law rendered performance unlawful, that the contract was at an end.

Odlin vs. Ins. Co., 2 Wash. C. C., 312.

Rogers vs. Hoyt, 4 Vt., 172.

Fitzgerald vs. Grand Trunk R. R., 13 L. R. A., 70 (Vt).

Bradford vs. Jenkins, 41 Miss., 336.

Previous to the application for a loan Bedford had no contract by which he could force a loan.

In Illinois Building & Loan Association vs. Walker, 42 S. W. Rep., 192, the charter of the foreign corporation provided: "Each shareholder may receive a loan of $100 for each and every share held by him when there is sufficient money in the treasury to supply the demand for loans. Such loans to be made on approved bids in the discretion of the Board of Directors." The loan was applied for after the passage of the acts of 1891, which were not complied with by the foreign corporation. The Chancery Court of Appeals of Tennessee held (42 S. W. Rep., 193):

"The provision in the charter above quoted gave to the stockholder only the privilege of applying for a loan to the amount therein stated, if he should see proper to do so. That provision did not obligate the company absolutely to loan the money, but was expressly conditioned upon the fact of there being a sufficient amount of money in the treasury, and also upon proper application being made, accompanied with proper security, with the right of the company to pass upon these

matters." The court held the application was but "the beginning of the negotiation for that purpose." The court said: "By becoming a stockholder the defendant, B. F. Walker, had merely acquired a status that would enable him to open negotiations for a loan. There was no contract between him and the company at that time which could be in any wise impaired by subsequent regulations prescribed by the Legislature for the conduct of the company's business. We are, therefore, of the opinion that the complainant can base no right against the statutes upon the stocg above referred to or by reason of the fact that Walker had become a stockholder."

The above decision was affirmed by the Supreme Court of Tennessee.

42 S. W. Rep., 192, 195.

The case of the U. S. Savings & Loan Co. vs. Miller, 47 S. W. Rep., 17, is also directly in point and on all fours with the case at bar. It was a decision by the Chancery Court of Appeals of Tennessee, which was affirmed by the Supreme Court of Tennessee, and is referred to in the certificate of the Circuit Court of Appeals herein. In this case the agents of the foreign building and loan company in Tennessee were mere soliciting agents, who forwarded applications that were acted upon at the home office of the foreign corporation. The notes were payable at the home office of the corporation, and the court held that the contract was concluded at such home office, but still held that the foreign corporation was doing business in Tennessee, and had not complied with the Tennessee laws, and that the contracts were void. The contracts expressly stipulated that they were made with reference to the law of Minnesota, but the court held that the law of Tennessee could not be avoided or evaded in this way.

47 S. W. Rep., 21, 22.

A note executed in Tennessee is void, even in the hands of an innocent purchaser, when given as part of a business transaction with an Ohio corporation that had not complied with the Tennessee prohibitory laws.

First National Bank of Massillon vs. Coughran, 52 S. W. Rep., 1112 (Tenn).

Before he applied for a loan Bedford had a mere privilege of applying therefor. Having no contract or vested right to a loan, the State of Tennessee had the power to impose limitations upon loans made after the passage of the acts of 1891, or to prevent them. Mere possibilities or expectancies that loans would be applied for could not prevent the operations of these acts.

Clark vs. McCreary, 12 S. & M. (Miss.), 347.
Price vs. Sessions, 3 How. (U. S.), 635.

Allen vs. Hawks, 136 U. S., 301.
Randall vs. Kruger, 23 Wall., 148.
Stephens vs. Cherokee Nation, 174 U. S., 478.
Taylor vs. Taylor, 12 Lea (Tenn), 496.

Right to bar a contingent remainder may be defeated by statute.

People's L. & E. Bank vs. Garlington, 32 S. E. Rep. (S. C.), 513.

In Hamilton Gas Light Co. vs. Hamilton, 146 U. S., 268, the court says: "Nor does every statute which affects the value of a contract impair its obligation. It is one of the contingencies to which parties look now in making a large class of contracts, that they may be affected in many ways by State and National legislation."

A State law "may be retrospective in its character and may divert vested rights and yet not violate the constitution of the United States, unless it also impairs the obligation of a contract."

Charles River Bridge vs. Warren Bridge, 11 Peters, 539.
Satterlee vs. Mathewson, 2 Peters, 413.

SECOND QUESTION.

The second question propounded by the Circuit Court of Appeals (Record, p. 133) is:

"Was the validity of the mortgage executed and delivered under the same circumstances to be determined by the validity of the note to which it was incident, or by the law of the State where the land lay which the mortgage conveyed, and which, upon default, must be sold to pay the notes?"

Of course, if the notes were invalid, the mortgage was, and therefore what has been said as to the first question applies equally to the second question. If it should be conceded, however, that the notes were valid, still the mortgage is invalid. The mortgage was executed in Tennessee, conveys Tennessee land, and necessarily has to be enforced in Tennessee. If the contract evidenced by the notes be valid, it is upon the theory that they are New York contracts, either because they are payable in New York, or because the notes were accepted by the association in New York. Any liability on the notes is based on the idea that they are beyond the jurisdiction of the State of Tennessee, and cannot be affected by its laws.

Now, the land which is embraced in the mortgage is situated in Tennessee and cannot be withdrawn therefrom, either actually or theoretically. The validity of all conveyances of said land is necessarily tested by the laws of the State of Tennessee. This is true whether the mortgagor executes the mort-

gage in Tennessee or outside of it. The validity of a contract as to land must be determined by the law of the place where the lands are situated.

Brine vs. Ins. Co., 96 U. S., 635, 636.

McGoon vs. Scales, 9 Wall, 27.

In Suydam vs. Williamson, 24 How., 433, the court said:

"The subject of the dispute is real property situated within the State of New York, and her laws exclusively govern."

In Clark vs. Clark, —— U. S., page ——, decided by the Supreme Court of the United States May 21, 1900, it was held that the equitable conversion of real property into personalty by will was a matter within the exclusive province of the State in which the land lies to determine, although the will was made elsewhere.

In Thompson vs. Kyle, decided December 21, 1897, by the Supreme Court of Florida, and reported in No. 1, Vol. 23, Southern Reporter, pages 15 and 16, the court said:

"It is almost universally held that so far as real estate is concerned, we must look to the laws of the State where it is situated for the rules which govern its descent, alienation and transfer, and for the construction, validity and effect of conveyance thereof," referring to many authorities.

See same case, 39 Fla., 582.

In that case parties living in Alabama executed a mortgage therein to secure payment of a debt contracted and payable therein. The mortgage was upon lands in Florida. One of the mortgagors was a married woman, and the mortgage was invalid under Alabama law, but it was held valid under the Florida law.

In Walling vs. C. & G. Grocery Co. (Fla.), 47 L. R. A., 608, it was held that though a woman had been made a free dealer by decree of court of another State, her status in Florida, with respect to enforcement of liabilities against her property therein situated was not changed.

The validity of the mortgage or conveyance necessarily depends upon the State law. The conveyance cannot be void in the State court and valid in the Federal court. Section 3 of the act, chapter 122 of acts of 1891 of Tennessee, expressly provides "that it shall be unlawful for any foreign corporation to do or attempt to do any business or to acquire any property in this State without first having complied with the provisions of this act."

In the face of this act and the other acts of the Tennessee Legislature, and of the repeated decisions of the Supreme Court of Tennessee holding mortgages void, how can the mortgage be held legal? A party taking a mortgage on Tennessee land is necessarily bound by Tennessee law as to it.

Mr. Wharton says that all interests in land "that may fall under the term lien in its most general sense are controlled by the lex rei sitae. * * * The only way by which title can be made to such liens, or the only process by which such liens can be enforced, is that of the situs."

Sec. 291 Wharton on Conflict of Laws.
Secs. 296, 276a, 275, 390a, 293 1b.
Story Confl. Laws, secs. 446, 447, 424, 364.

"So if the laws of a State prohibit the making of a mortgage to secure future advances or liabilities, a mortgage in this form of land in that State would not be recognized there, although made in a State where such a mortgage would be valid."

Sec. 662, 1st Jones on Mortgages (4th Ed).
Goddard vs. Sawyer, 9 Allen (Mass.), 78.
See also Hosford vs. Nichols, 1 Paige Ch. R., 226.

The United States Court followed the Louisiana law as to the necessity of reinscribing mortgages.

Bondurant vs. Watson, 103 U. S., 288.

The power of a State over property situated therein is so absolute that mere personal property can be classed as immovable.

McCollum vs. Smith, Meigs (Tenn.), 341.
Jones vs. Marble, 6 Hump. (Tenn.), 116.
Green vs. Van Buskirk, 7 Wall., 139.

Where an act made the lien of a judgment depend upon registration of a copy in the county where the debtor resided, it was held this applied to judgments of the Federal Courts.

Reed vs. House, 2 Hump. (Tenn.), 581.

The act, chapter 122, of 1891 of Tennessee, in section 3, provides "that it shall be unlawful for any foreign corporation to do or attempt to do any business, or to own or to acquire any property in this State, without having first complied with the provisions of this act."

Taking a mortgage was acquiring property, in the sense of this act. It has been held that a deed of trust is an interest or estate in land, and not a mere incident to the debt.

Ormsby vs. Oltman, 85 F. R., 495.

The principle was further recognized in Cutter vs. Davenport, 1 Pick. (Mass.), 86, where it was held that an administrator could not transfer a mortgage. The court said: "The assignment of a mortgage is in one view merely an assignment of the debt with the collateral security for the payment of it. But after a foreclosure the land becomes the principal thing, and the debt is extinguished to the extent of the value of the land. It must therefore be anticipated in the making and the assignment of a mortgage that the land may eventually be

held as an absolute estate by virtue of these conveyances, and that they must be such as would be sufficient to convey the land if the conveyance was absolute and without condition."

The case of McIlwaine vs. Isely, 96 F. R., 68, 69, is directly in point. In that case a suit was brought in the Circuit Court of the United States in North Carolina to foreclose a mortgage. The court held that the contract secured by the mortgage was a Tennessee contract, but that in the enforcement of the mortgage the law of North Carolina, as defined in the decisions of her courts, had to be followed. The court therefore held that in the foreclosure proceedings the debt had to be treated as usurious, though it would not have been so independently of the mortgage.

See also Maroney vs. Association, 116 N. C., 891 (47 Am. St. Rep., 841).

If the notes in the present case can be enforced it is upon the theory that the State law can be disregarded in favor of the non-resident corporation. But how can the State law as to the validity of the mortgage on land situated therein be disregarded? The State, having the right to exclude the foreign corporation and to prevent its acquiring property or interests therein within its borders, can such corporation take as an incident what it could not take directly? Is the title to this mortgage to be considered bad in the State court, but good in the Federal court? The land could not actually or theoretically be carried out of the State, and the State law must determine the title thereto. The fact that a mortgage is incident to a debt cannot change this principle. The legal capacity to make or take a mortgage of land, and the legal capacity to make or take other contracts, are determined by different rules.

Mr. Wharton, in his work on Conflict of Laws, sec. 292, speaks of the pledge or mortgage of land being "merely collateral to a personal contract of loan." All the cases referred to by him, however, involved simply questions of usury, and the principal contract was valid. So far as usury is concerned, parties in many cases may, in good faith, make contracts payable in foreign States, and contract to pay interest according to the laws of such States. No one, however, can disregard the laws of his State as to the conveyance of land situated therein.

Mr. Wharton shows the situs of a debt and the situs of a mortgage securing it are entirely different.

Sec. 368 Wharton on Conflict of Laws.

In Hamilton vs. Fowler, 99 F. R., 21, the court refers to various authorities, holding that a mortgage is incident to the debt. In all of the cases referred to the parties had the legal

capacity to execute the contract, as well as the mortgage securing it. Of course, in such cases the mortgage may be regarded as an incident merely. But where there is a want of legal capacity to execute or take the mortgage, it cannot be regarded as a mere incident.

THIRD QUESTION.

The third question submitted by the Circuit Court of Appeals (Record, p. 133) is:

"May a State, by its laws forbidding the transaction of business within its borders, annul the contracts of its citizens, entered into and to be performed without the State, when those contracts are but the consummation of the inhibited business within the State, without an infraction of the fourteenth amendment to the Constitution of the United States?"

We do not understand the United States Circuit Court of Appeals in this question to intimate that the contracts in question were technically "entered into" in New York. The Circuit Court of Appeals has not said so in the statement of facts made by it, and we insist, as we have hereinbefore done, that the contracts were made and closed in Tennessee.

We also in this connection again insist that even if the contracts were technically closed in New York, that they were made in the course of and as a part of a general business admittedly carried on by the Eastern Building & Loan Association in Tennessee, which business was forbidden by Tennessee law. This illegal business cannot be made practically legal by having all the contracts made therein closed outside of the State of Tennessee. To so hold seems to us to sanction a plain evasion of the Tennessee laws. By such a decision all laws attempting to control foreign corporations are practically destroyed.

It is plain that Bedford had no fixed or vested right to a loan by virtue of the fact that he held stock in the Eastern Building & Loan Association. He could only get a loan if the association chose to give it to him. Any loan was dependent not only upon the condition of the association, but upon its willingness to loan him. The association could not force him to borrow, and when the State law forbade the business Bedford could not assist the association in breaking that law.

Hooper vs. California, 155 U. S., 656.

The Supreme Court of Tennessee has decided that there is no vested right to a loan, merely because a party holds stock, and the cases are identical with the cases at bar.

Ill. B. & L. Association vs. Walker, 42 S. W., 192.

N. Y. N. B. & L. Association vs. Cannon, 41 S. W. Rep., 1055.

99 Tenn., 344.

In Connecticut, etc., Ins. Co. vs. Spratly, 172 U. S., 602, it was held that the State having the right to impose such terms upon the foreign corporation desiring to do business therein as it saw fit, that the State could alter, withdraw or add to these terms thereafter. The court said:

"In all such cases there can be no contract springing from a compliance with the terms of the act and no irrepealable law," etc.

The fact that the Eastern Building & Loan Association had sold stock to Bedford before the passage of the acts of 1891 did not give the association any right, after the passage of the laws of 1891, to loan to Bedford, or him any right to demand a loan of such association.

The Fourteenth Amendment of the Constitution of the United States certainly was not designed to aid foreign corporations to evade State laws.

Can such corporations make a fraudulent use of such constitutional amendment, so as to enable them to do indirectly what they admittedly cannot do directly?

Can such corporations come right up to the State line, send its agents across such line, solicit and bring about business in the State foreign to its domicile, and when all the contracts in such forbidden business are about to be closed by the citizens of such State, have them closed ouside of the State and thereby avoid the State law?

In 11th Vesey, 628, the Court said:

"Upon the statute of frauds, though declaring that interest shall not be bound except by writing, the cases in this Court are perfectly familiar deciding that a fraudulent use shall not be made of that statute."

In Plumley vs. Massachusetts, 155 U. S., 479, it is said: "The Constitution does not secure to anyone the privilege of defrauding the public."

In Hooper vs. California, 155 U. S., 658, the Court shows that the States having the right to exclude foreign corporations, that the laws in respect thereto, should be so construed as not to allow the contracting parties to avoid their effects. The Court, arguing against a construction contended for, says:

"It would be only necessary for such a corporation to have an understanding with a resident that in the effecting of contracts between itself and other residents of the State, he should be considered the agent of the insured persons, and not of the company. This would make the exercise of a substantial and valuable power depend not on the actual facts of the transactions over which it lawfully seeks to extend its control, but upon the disposition of a corporation to resort to a mere subterfuge in order to evade obligations properly imposed upon it.

Public policy forbids a construction of the law which leads to such a result, unless logically unavoidable."

In this same case, the Court (155 U. S., 656) says, speaking with reference to the right of the State to exclude foreign corporations or to impose terms on them that such State "has also the further right to prohibit a citizen from contracting within her jurisdiction with any foreign company, which has not acquired the privilege of engaging in business therein either in his own behalf or through an agent empowered to that end." Now, the State having this power, of course, has the power to prohibit its citizens and the foreign corporation within its limits from attempting to bring about the forbidden business of the foreign corporation. The agencies established by the foreign corporations in Tennessee and the efforts of these agents preliminary to the closing of contracts in such business were all illegal, as the corporation had not complied with the Tennessee law. Everything done up to the very closing of the contracts (if we assume that such contracts were technically closed outside of Tennessee) was illegal.

How can contracts based on, founded upon and growing out of these illegal acts, become legal simply because they are made just across the State line?

In Waters-Pierce Oil Co. vs. Texas, 177 U. S., 28, Hooper vs. California is referred to approvingly.

Every country will judge for itself how far it will "adopt and how far reject any such acts or contracts" in evasion or derogation of its laws.

Sec. 106 Story Conflict on Laws.

Gardner vs. Lewis, 7 Gill (Md.), 392, 404.

The case before the Court is not an isolated transaction. It is a part of a general business carried on in Tennessee, and the Court is asked by the corporation to say it could carry on such business in Tennessee and invite citizens of that State to go out of the State physically or theoretically so they and the corporation could evade the State law. Is not this a plain attempt to make a "fraudulent use" of the Fourteenth Amendment?

In the opinion referred to the Court say (155 U. S., 658):

"The Fourteenth Amendment, however, does not guarantee the citizen the right to make within his State either directly or indirectly a contract, the making whereof is constitutionally forbidden by the State.'

In the case before the Court Bedford never left the State of Tennessee. Every paper he signed was executed within Tennessee. Could he be heard to say, when he had always been within the jurisdiction of Tennessee and subject to its laws, that he had the right, under the Fourteenth Amendment, to

have papers sent outside of Tennessee, to be accepted outside of Tennessee, and that he, therefore, in such contracts, was not subject to Tennessee laws? When Bedford remained always in Tennessee, could not that State forbid him to evade its laws and forbid him to assist the foreign corporation in carrying on its illegal business in Tennessee? We submit it clearly could. If Bedford were insisting that the contracts were valid, he would have no standing in court. Now, of course, the Eastern Building and Loan Association, in dealing with Bedford and the other parties it did business with, knew their actions were illegal, as it was bound to know the law. Can the Fourteenth Amendment protect a business or a contract thus procured under such circumstances? We submit not. If the State of Tennessee had the right to forbid Bedford, its own citizen, to make the contracts the association could acquire no rights. Bedford was under a legal disability just as much so as if he had been a lunatic, or a feme covert, or otherwise been unable to make a contract. We submit, therefore, that if the contracts were consummated outside of Tennessee theoretically, that still they were illegal.

In Dugger vs. Ins. Co., 95 Tenn, 247, the Supreme Court of Tennessee held an Act making void all stipulations in insurance policies limiting liability to less than the full amount of loss, not exceeding the amount of insurance, did not violate the Fourteenth Amendment.

> See also Eq. L. Ins. Society vs. Clements, 140 U. S., 226.
>
> N. Y L. Ins. Co. vs. Russell, 77 F. R., 103, 104.
> Pearce vs. People, 106 Ill., 22.

The Philadelphia Fire Ins. Co. had been doing business legally in New York from 1872. In 1865 the Legislature of New York passed a law providing that whenever laws of any other State should require New York corporations doing business there to pay greater license fees than the laws of New York required of foreign corporations doing business in that State, that then New York would require a similar license fee of foreign corporations doing business in that State. In 1873 the State of Pennsylvania passed a law imposing a tax of 3 per cent. yearly on premiums received by foreign insurance companies in Pennsylvania. In 1882 the insurance officer of New York required the Philadelphia Fire Association to pay as a license fee a tax of 3 per cent. on premiums received by it in New York in 1881. The Philadelphia Fire Association claimed "that being in the State (New York) by permission of the State continuously from 1872 to 1882, the State imposed on it while there in 1882 an unequal and unlawful burden; and that the

New York Act of 1865 did not come into effect as to Pennsylvania corporations until the Pennsylvania Act of 1873 was passed, at which time the defendant had already been a year in the State."

The Court held that the tax was legal, and that it did not violate the provisions of the Fourteenth Amendment of the United States Constitution, providing that no State shall, "deny to any person within its jurisdiction the equal protection of the laws." The Court (119 U. S., p. 119) said: "The State having the power to exclude entirely, has the power to change the conditions of admission at any time for the future and to impose as a condition the payment of a new tax or a further tax as a license fee. If it imposes such license fee as a prerequisite for the future, the foreign corporation, until it pays such license fee, is not admitted within the State or within its jurisdiction. It is outside at the threshold seeking admission with consent not yet given."

Phila. Fire. Asso. vs. New York, 119 U. S., 110
Manchester F. Ins. Co. vs. Herriott, 91 F. R., 711.

Now, if fresh terms can be imposed on a foreign corporation, where it is doing business legally in a State and it be thus legally run out of the State without violating the Fourteenth Amendment, it would seem that amendment was not violated by preventing the foreign corporation evading the laws the State had the right to make.

To same effect is Norfolk &c. R. R. vs. Penn., 136 U. S., 114. In this case the Court (page 118) refers to Pembena Mining Co. vs. Pennsylvania, 125 U. S., 181, saying, "in that case we held, following Paul vs. Virginia, 8 Wall, 168, that corporations are not citizens within the meaning of Clause I., Section 2, of Article IV. of the Constitution of the United States, declaring that 'the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States.' And we also hold that Section 1 of the Fourteenth Amendment to the Constitution, declaring that no State shall 'deny to any person within its jurisdiction the equal protection of its laws,' does not prohibit a State from imposing such conditions upon foreign corporations as it may choose as a condition of their admission within its limits. See also Philadelphia Fire Ass'n. vs. New York, 119 U. S., 110."

See also Home Ins. Co. vs. N. Y., 134 U. S., 594.

In Paul vs. Virginia, the Court said as to foreign corporations:

"The recognition of its existence, even by other States, and the enforcement of its contracts made therein depend purely upon the comity of these States—a comity which is never extended where the existence of the corporation or the exercise

of its powers are prejudicial to their interests or repugnant to their policy. Having no absolute right of recognition in other States, but depending for such recognition, and the enforcement of its contracts upon their assent, it follows, as a matter of course, that such assent may be granted upon such terms and conditions as those States may think proper to impose. They may exclude the foreign corporations entirely; they may restrict its business to particular localities, or they may exact such security for the performance of its contracts with their citizens as in their judgment will best promote the public interest. The whole matter rests in their discretion."

Paul vs. Va., 8 Wall., 181.

In this case the Court shows in the clearest manner that foreign corporations have no rights outside of their own State, except such as are voluntarily allowed them. The Court (p. 182) shows that the exercise of this right of exclusion and discrimination is of the highest importance, saying:

"It might be of the highest public interest that the number of corporations in the State should be limited; that they should be required to give publicity to their transactions; to submit their affairs to proper examination; to be subject to forfeiture of their corporate rights in case of mismanagement, and that their officers should be held to a strict accountability for the manner in which the business of the corporations is managed, and be liable to summary removal."

8 Wall., 182.

In Ducat vs. Chicago, 10 Wall., 415, the Court says:

"As to the nature or degree of discrimination, it belongs to the State to determine, subject only to such limitations on her sovereignty as may be found in the fundamental law of the Union."

The Fourteenth Amendment of the Constitution does not impair the police power of a State.

Barbiere vs. Connolly, 113 U. S., 27.

Statutes like the one in question, passed by the Legislature of the State of Tennessee are an exercise of the police power of a State to protect its citizens.

Eagle Ins. Co. vs. Ohio, 153 U. S., 446.

Missouri P. R. R. Co. vs. Humes, 115 U. S., 512.

In Patterson vs. Kentucky, 97 U. S., 505, the Court said: "We have frequently decided that the police powers of the State were not surrendered when the Constitution conferred upon Congress the general power to regulate commerce with foreign nations and between the several States."

In Am. U. T. Co. vs. W. U. T. Co., 67 Ala., 23, it is said: "These regulations by a State of foreign corporations are police regulations; just as much a police regulation for the pro-

tection of the property interests of the citizens of the State as a law forbidding vagrancy among its inhabitants."

See also Dudley vs. Collier, 87 Ala., 431.

Certainly this police power to protect its own citizens is not lost by a State simply because the foreign corporations against whom protection is attempted evades the law by having contracts in its business closed outside of the State.

We submit that having no right to transact business in Tennessee in defiance of the State laws, that the Eastern Building and Loan Association cannot claim its "privileges or immunities" are abridged, or that it is denied "the equal protection of the laws" when the contracts taken by it in an illegal business are refused to be enforced. The attempt to enforce the contracts in question is based on a manifest evasion of the law; no foreign corporation can have a constitutional right to evade the law.

A statute requiring full payment of a policy does not violate the Fourteenth Amendment.

Orient Ins. Co. vs Daggs, 172 U. S., 557.

Daggs vs. Ins. Co., 35 L. R. A., 228.

See also

Bank vs. Penn., 167 U. S., 461.

Before the Tennessee Acts in question were passed foreign building and loan associations could transact business in Tennessee without having to undergo any examination as to their financial condition and affairs. To prevent irresponsible corporations from invading Tennessee, the laws in question were passed, requiring them to exhibit their charters, make known their condition and deposit securities. Of course it was the business of and to the interest of such corporation to loan money in Tennessee and they were bound to comply with the State laws when they undertook to carry on business in Tennessee.

The right of a State to require deposit of securities is undoubted.

Lewis vs. A. S. and L. Assn. (Wis.), 39 L. R. A., 559.

Blake vs. McClung, 172 U. S., 257

The above case of Blake vs. McClung holds that a corporation is not a citizen within the meaning of the constitutional provision that the citizens of each State "shall be entitled to "all privileges and immunities of citizens in the several States," and that a foreign corporation cannot invoke such provision. While holding that such corporation was "a person" under the Fourteenth Amendment, it was held that such corporation was not deprived of property without due process of law by making the claim of the foreign corporation subordinate to the claims of Tennessee creditors.

FOURTH QUESTION.

The fourth question submitted (Record, p. 133) is:

"Even if a State may by law refuse enforcement of such a contract in its courts, should a Circuit Court of the United States sitting in the State refuse to enforce it when jurisdiction over the parties exists by reason of their diverse citizenship?"

The courts, of course, have nothing to do with the policy of the laws of Tennessee in question. Mr. Endlich, in his work on the Interpretation of Statutes, Section 5, says:

"So long as a legislative enactment violates no constitutional provision or principle, it must be deemed its own sufficient and conclusive evidence of the justice, propriety and policy of its passage."

See also Endlich, Sections 6, 7, 8.

In Amy vs. Watertown, 130 U. S., 319, it is said:

"With motives we have nothing to do. Certainly improper motives cannot be attributed to a State Legislature in the passage of any laws for the government of the State."

In Paul vs. Virginia, 8 Wall., 182, the wisdom of State laws attempting to regulate foreign corporations is commended.

The State of Tennessee had the right to pass the prohibitory laws as to foreign corporations.

It is perfectly well settled that any State has the right to exclude any foreign corporation from transacting business within its limits, and that any terms can be imposed on the foreign corporation seeking to do business within the State that the State sees fit to impose.

Bank vs. Earl, 13 Pet., 519.
Ins. Co. vs. French, 18 How., 404.
Paul vs. Virginia, 8 Wall., 168.
Ducat vs. Chicago, 10 Wall., 410.
Fritz vs. Palmer, 132 U. S., 282.
Young vs. S. T. I. Co., 85 Tenn., 197.
R. R. Co. vs. Harris, 12 Wall., 82.
State vs. Phoenix Ins. Co., 92 Tenn., 587.
Talbott vs. F. C. Co., 13 L. R. A., 584.
Allegeyer vs Louisiana, 165 U. S., 583.
Ashley vs. Ryan, 153 U. S., 445.
Horn Silver M. Co. vs. N. Y., 143 U. S., 314.
Hooper vs. California, 155 U. S., 652.

The Fourteenth Amendment of the Constitution of the United States does not abridge this right of the States to ex-

clude foreign corporations. The only limitation is where the business is strictly commerce, interstate or foreign.

Pembina Co. vs. Penn., 125 U. S., 181.

Horn Silver M. Co. vs. N. Y., 142 U. S., 314.

The fact that commerce is indirectly affected is immaterial.

People vs. Wemple, 131 N. Y., 65.

See also

Merchants Bank vs. Pa., 167 U. S. 463, 464.

This right of a State to exclude foreign corporations is so absolute that it can withdraw its license to the foreign corporation if it insists on its right of going into the Federal Court.

Doyle vs. Ins. Co., 94 U. S., 541.

The loaning of money by a foreign corporation is not a matter of interstate commerce, and it may be subjected to conditions by the State.

Nelms vs. Edinburgh Co., 92 Ala., 157.

So. B. & L. Co. vs. Norman (Ky.), 31 L. R. A. 41.

98 Ky., 294.

"Business done within the State cannot be made to mean business done between that State and other States."

Pacific Express Co. vs. Seibert, 142 U. S., 339, 350.

In Nathan vs. Louisiana, 8 How. (U. S.), 80, 81, it was held that a dealer in exchange was "not engaged in commerce, but in supplying an instrument of commerce," and that money it self was a mere instrument of commerce.

The fact that commerce may be indirectly affected is immaterial.

Brass vs. North Dakota 153 U. S., 391.

Hopkins vs. U. S., 171, U. S. 591, 592.

The State of Tennessee having the right to pass the prohibitory laws, as to foreign corporations doing business in her limits, the United States Courts are bound by the State construction of those statutes as made by the State Courts.

The construction of State statutes by State Courts is conclusive.

Watson vs. Lane, 10 L. R. A., 784.

Rhodes vs. Bank, 34 L. R. A., 742.

The case of the Bank of Augusta vs. Earle, 13 Peters, 589, shows that the comity enforced or denied "is not the comity of the courts, but the comity of the nation." The United States Courts can then only enforce the law or policy declared by the State of Tennessee and its authorities as to foreign corporations.

In Elmandorf vs. Taylor, 10 Wheat., 159, 160, Chief Justice Marshall shows United States Courts are bound by State decisions construing State statutes, just as State Courts are bound by United States decisions as to United States laws,

unless such decisions "come in conflict with the Constitution, laws or treaties of the United States."

United States Courts wait for State decisions as to State statutes so as to conform to them.

Davie vs. Briggs, 97 U. S., 637.
Pelton vs. Bank, 11 Otto, 143-148.

United States Courts change their decisions so as to follow State decisions as to State Statutes.

Green vs. Neal, 6 Pet., 295.
Leffingwell vs. Warren, 2 Black 603.
Christy vs. Pidgeon, 4 Wall., 196.
Fairfield vs. Gallatin, 100 D. S., 52.

The duty of United States Courts as to such matters is "to yield rather than encroach."

Fullerton vs. Bank, 1 Pet., 614.

In the following cases the decisions of the Court, made after the trial in the lower court, or after suit began, was followed:

U. S. vs. Morrison, 4 Pet., 136.
Seibert vs. M. & A., of Pittsburg, 1 Wall., 272.
R. R. Tax Cases, 92 U. S., 617.
Forsyth vs. Hammond, 166 U. S., 506.
Bauserman vs. Blount, 147 U. S., 647.
Moores vs. Bank, 104 U. S., 625.
Miller vs. Ammon, 145 U. S., 421.
Flash vs. Conn., 109 U. S., 371.
Norton vs. Shelby Co., 118 U. S., 425.

See also

Union Bank, of Chicago, vs. Kansas City Bank, 136 U. S., 223.

In Adams Ex. Co. vs. Ohio, 165 U. S., 195, the decisions of the State of Ohio were followed and property of corporations engaged in interstate commerce was valued as a unit for taxation.

It has been held in New York that the construction by State courts of State statutes was controlling, though the decision was made after the contract in question and after suit brought.

Jesup vs. Carnegie, 80 N. Y., 441.

In Burber vs. R. R., 125 U. S., 555, the Supreme Court, against its own convictions, followed Massachusetts decisions as to effect of trading on Sunday.

The Court reversed a previous ruling involving land and followed the last State decision, saying:

"The subject of this dispute is real property lying within the State of New York and her laws exclusively govern."

Snydam vs. Williamson, 24 How., 427, 433.

It is said in Flash vs. Conn., 109 U. S., 378, as to State decisions: "It is true this decision was made after the defendant

had become a stockholder in the Pensacola Lumber Co., but there had been no previous contrary decision. As said by this Court in Burgess vs. Seligman, 107 U. S., 20, even in such cases for the sake of harmony and to avoid confusion the Federal Courts will lean toward an agreement of views with the State Courts if the question seems to them balanced with doubt."

The Court further said in that case (109 U. S., 378):

"We think this is a case where the construction of the State Court is entitled to great, if not conclusive weight with us. It is the settled construction of a law of the State upon which the rights and liabilities of a large number of its citizens must depend."

In R. R. Tax Cases, 92 U. S., 618, it is said there are "few exceptions" to the rule that State decisions will be followed.

To same effect:

Adams Ex. C. vs. Ohio, 165 U. S., 219.

In Forsyth vs. Hammond, 166 U. S., 520, the State decisions made after the trial in the lower court was followed, as it "was upon a question of local nature involving the internal policy of the State, and therefore such a decision as should be, generally speaking, recognized and followed by the Federal Courts." The Court declined to follow Burgess vs. Seligman, 107 U. S.

In Miller vs. Ammon, 145 U. S., 423, the contract involved was made before the decision of the State Court construing the statute, yet such decision was followed by the United States Court, which refused to follow Burgess vs. Seligman, 107 U. S., 20; Anderson vs. Santa Anna, 116 U. S., 556; Butz vs. Muscatine, 8 Wall., 575, and similar cases. In so deciding the Court (143 U. S., 423, 424) said the question was one of a "particularly local character" and that "there has been no change in the rulings of the Supreme Court on this question" by the State.

In Amy vs. Watertown, 130 U. S., 318, the Court says:

"In the construction of a State statute in a matter purely domestic (as this is) we always feel strongly disposed to give great weight to the decisions of the highest tribunal of the State."

In Elmwood vs. Marcy, 92 U. S., 294, it is said the State decisions will be followed, "except where they have been construed differently at different times."

In Nichols vs. Levy, 5 Wall., 444, the decision of the State Court was followed, the matter "being a local statute, and involving a rule of property," although the Court thought the decision was wrong.

Such State decisions are followed "unless they conflict with or impair the efficacy of the Federal Constitution or of a Fed-

eral statute or a rule of general commercial law."

Stutsman vs. Wallace, 142 U. S., 306.
Gormly vs. Clark, 134 U. S., 348.
Norton vs. Shelby County, 118 U. S., 439.

The Tennessee laws in question violate no Federal statutes. Hooper vs. California, 155 U. S., 648, which is approved in Allgeyer vs. Louisiana, 165 U. S., 578, shows such laws are not in conflict with the Federal Constitution. Such rules do not violate any rule of general commercial law.

So. B. & L. Asso. vs. Norman (Ky.), 31 L. R. A., 43.
98 Ky., 294.
172 U. S., 358, 359.

In M. K. & T. Co. vs. Krumseig it was held that where there is a State statute making void a contract for usury, the public policy of the State will be enforced in the United States Courts.

In N. Y., etc., vs. Roberts, 171 U. S., 661, it is said:

"It must be regarded as finally settled by frequent decisions of this Court that, subject to certain limitations, as respects interstate and foreign commerce, a State may impose such conditions upon permitting a foreign corporation to do business within its limits as it may judge expedient."

In Pacific Express vs. Seibert, 142 U. S., 350, the validity of the State statute was sustained, the Court saying, "business done within this State cannot be made to mean business done between that State and other States."

A decision by the Supreme Court of Pennsylvania that the Erie Railroad was doing business in that State in the sense of its act, was held conclusive.

Erie R. R. vs. Pennsylvania, 21 Wall., 492.

The statutes of Tennessee in question were in regard to local matters and concerned the rights of the State of Tennessee and "the rights and liabilities of a large number of its citizens." These statutes did not affect any foreign corporation that stayed at home, but only those that came to Tennessee and did business therein. If the construction that the Tennessee courts have given these statutes be not followed, and it be held that the mere form of the contracts by which the general business of the corporation is carried on, exempts the foreign corporation from Tennessee law, the result would be that Tennessee statutes are practically dead and that Tennessee cannot prevent an invasion of foreign corporations, no matter how worthless they may be. What foreign building and loan association will deposit $25,000 or $50,000 as security in Tennessee, when it can retain this money by simply varying the forms of contracts taken by it in its business carried on in Tennessee? The foreign corporation that violates and evades the Tennessee law would be better off than the one that obeyed it.

In 164 U. S., 155, it was said:

"If the act violates any provision expressed or properly implied of the Federal Constitution it is our duty to so declare it, but if it do not, there is no justification for the Federal Courts to run counter to the decisions of the highest State Court upon questions involving the construction of State statutes or constitutions on any alleged grounds that such decisions are in conflict with sound principles of general constitutional law."

Falbrook vs. Bradley, 164 U. S., 155.

See also

Osborne vs. Florida, 164 U. S., 650.

In Leeburger vs. McCormick, 175 U. S., 274, it was held that the decision of a State Court holding that by reason of their false assumption of corporate authority its officers, directors and shareholders of what purported to be a national bank, but which never obtained legal authority to do business, became liable as partners, on the principle of agency for contracts entered into in the name of the corporation, does not involve any Federal question.

Questions of public policy generally "are governed by the "law of the State as expressed in its own Constitution and statutes or declared by its highest court."

Hartford F. Ins. Co. vs. C., M. & St. P. R. R., 175 U. S. 91

While Tennessee is the sole judge of what laws shall exist in her territory, and of the construction that is to be given these laws, it may be observed that the construction her courts have put on the laws in question is in accordance with decisions of other States and with those of the Supreme Court of the United States. The decisions of the State of New York, the situs of the Eastern Building and Loan Association, are in accord with the Tennessee decisions.

In Pennington vs. Townsend, 7 Wendell, 276, the Court held, quoting a previous New York case:

"It is a fundamental rule that all contracts which have for their object anything repugnant to the general policy of the law or contrary to the provisions of a statute are void * * * In the same case Mr. Justice Woodworth says an agreement expressly prohibited by statute must necessarily be considered inoperative and void. It will not be seriously urged that the party is subject to the penalty only, and that the courts are bound to consider the contract legal and valid."

The Court held that although penalties were provided the contract was void and repudiated the attempted distinction between *malum prohibitum* and *malum in se*.

See also Neuchatel Asphalt Co. vs. Mayor, etc., 9 Misc. (N. Y.), 376, referring to numerous cases.

It was further held that the construction by State Courts of

State statutes was controlling, even though the decisions were made after the contract in question and after suit brought.

Jessup vs. Carnegie, 80 N. Y., 441.

See also N. H. D. B. Co. vs. P. S. Co., 25 Wend., 648, 24 L. R. A., 303—note as to "Retaliatory Statutes."

McCanna vs C. T. & S. Co., 74 F. R., 597.

Eberhardt vs. Robertson, 78 Mo. App., 404.

In Re. Comstock, 3 Sawyer, 218, construed an act of Oregon which was similar to the Tennessee acts. The case refers to various Massachusetts cases and to National M. & F. I. Co. vs. Piersal, 10 Allen (Mass.), 232.

C. M. H. A. Co. vs. Rosenthal, 55 Ill., 90.

Aetna Ins. Co. vs. Harvey, 11 Wis., 395.

The various acts construed in these cases were similar to the Tennessee acts, and the decisions were like the Tennessee decisions.

Addison on Contracts, Vol. 2, Sec. 1147, says:

"Everything in respect of which a penalty is imposed by statute must be taken to be a thing forbidden and a contract to do such thing is absolutely void to all intents and purposes whatsoever. * * * Where a contract is to do a thing which cannot be performed without a violation of the law, it is void, whether the parties knew the law or not."

Teal vs. Walker, 111 U. S., 242, says "that contract was contrary to the public policy of the State of Oregon, as expressed in the statute just cited, and was not binding on the mortgagor or his vendee, and although not expressly prohibited by law, yet like all contracts opposed to the public policy of the State, it cannot be enforced."

See also

U. S. Bank vs. Owens, 2 Peters, 527.

Endlich on Stat., Sec. 449 to 452.

In Gibbs vs. Consolidated Gas Co., 130 U. S., 396, the Court held:

"The law cannot recognize as valid any undertaking to do what fundamental doctrine or legal rule directly prohibits; nor can it give effect to any agreement, the making whereof was an act violating law." The Court further held:

"The distinction between *malum in se* and *malum prohibitum* has long since been exploded, and * * * and it is clear that contracts in direct violation of statutes expressly forbidding their execution cannot be enforced."

The Court adds: "We cannot assist the plaintiff to get payment for efforts to accomplish what the law declared should not be done."

In Miller vs. Ammon, 145 U. S., 421, it was decided that the price of liquor sold in violation of law could not be recovered.

The contract was held void, though the ordinance prohibited the sale with a penalty.

"Premium notes taken before compliance with statutes are absolutely void, or at least cannot be recovered upon by the corporation until compliance with the statute is had."

8 Am. and Eng. Ency. of Law, 1 Ed., 341, 342.

The following authorities are on all-fours with the case at bar, and leave no room for discussion. The statute of Alabama is in all respects the same as the Tennessee statute. Foreign corporations did business in Alabama, and when an effort was made to enforce those contracts the Court in every instance refused relief, simply because the statute had not been complied with.

Farrier vs. N. E. M. Co., 88 Ala., 275.

Mullens vs. N. F. S. & M. Co., Ala., 7 So. Rep., 201.

Christian vs. A. L. F. S. & M. Co., Ala., 7 So. Rep., 427.

All the above were suits in equity to foreclose mortgages, given to secure the payment of money loaned by the complainant to the defendant, Dundee M. T. & Ins. Co vs. Nixon, 10 So, Rep. 311, was an action at law on a note for loaned money; Dadley vs. Collier, 87 Ala. Rep., 431, was a suit by the agent of a foreign corporation to recover commissions for negotiating the loan, and in this case all of the questions are fully discussed.

Seamens vs. Temple, 105 Mich., 400.

Cowan vs. L. Asso. Co., 73 Miss., 321.

We call the attention of the Court especially to the above named Alabama decisions, for the reasons that the questions presented and decided are identical with those in this record. In the above cases the Court draws the marked distinction between an executed contract and one that is executory. And the opinions are invaluable in this—that in Sherwood vs. Alvis, 83 Ala., 115, the Court held that a contract with a foreign corporation which had not complied with the laws of Alabama, and *which had been fully executed* could not be set aside or rescinded at the suit of the other party; that he was estopped to plead the invalidity of the contract, as the Court would not assist either party to an illegal contract, but leave them where they had placed themselves.

Sherwood vs. Alvis, supra, is in full accord and harmony with Seymour vs. Goldmines, 153 U. S., 523, and with Fritz vs. Palmer, 132 U. S., 282, and other similar cases, and with C. R. & C. R. Co. vs. Evans, 66 Fed. 812. The Alabama authorities, supra, which we rely upon, all sustain Sherwood vs. Alvis, supra. See also Long vs. G. P. R. R. Co., 91 Ala., 519. The distinction as noted is that one is an *executed*, the other an *executory* CONTRACT. Judge Lurton in 66 Fed., 816, rec-

ognizes the distinction, and says: "In the case last cited the Court recognized the obvious distinction between a contract executed and one executory." And again on the same page he continues: "A very broad distinction exists between an executed and an executory agreement. The statute has declared no forfeiture."

Judge Lurton, in delivering this opinion, had under consideration Chapter 122 of Tennessee Acts of 1891, This is the point in all the cases—no forfeiture has been declared by the State, and until this is done, all executed contracts must stand. *The law is that an executed agreement is no longer a contract; the performance of the contract dissolves the contractual relations between the parties.*

The law is clear that there can be no recovery upon a contract made in violation of a statute, the violation of which is prohibited, whether by penalty or not. This is so, although the statute does not, in terms, pronounce the contract void.

Miller vs. Ammon, 145 U. S., 421.
Thompson on Corp., Vol. 6, Sec. 79.
Morawitz on Corp., Sec. 44.
Sandage vs. S. B. M. Co., 142 Ind., 148 (51 Am. St. Rep. 179 and note).
Woods vs. Armstrong, 54 Ala., 150 (25 Am. Rep. 672 and notes 674-76).
V. M. H. A. Co. vs. Rosenthal, 55 Ill., 85 (8 Am. Rep. 626).
Thorne vs. Traveling Ins. Co., 80 Pa., St. 5 (21 Am. Rep. 92).
Wheaton's Law of Contracts, Vol 1, Sec. 363.

The Act of Tennessee, Chapter 2 of 1891 Acts, provides no penalty and prohibits the business. All of the authorities agree that in such case the contract is absolutely null and void.

Thompson on Corporations, Vol. 6, Sec. 7950.

It cannot be contended that Bedford was estopped to defend herein. He did not know of the existence of the Tennessee laws in question when the contract was made or that the association had not complied with them (Record p. 93.), while the said association did know of them, and did not comply with them. (Record p. 92.) The fact that Bedford held stock in the association cannot estop him. As far back as in Bank of Augusta vs. Earle, 13 Peters, 586, 587, it was decided that "wherever a corporation makes a contract, it is the contract of the legal entity of the artificial being created by the charter, and not the contract of the individual members." If an estoppel could be claimed, it would amount to a total re-

peal of the Tennessee statutes, and in effect allow the corporation to loan all its funds in Tennessee, although the law forbid it.

The State can prohibit its citizens from contracting.

Hooper vs. California, 155 U. S., 648.

There is no estoppel to show the legal incapacity of the corporation.

Keen vs. Coleman, 39 Pa., St. 299.
Welland Canal vs. Hathaway, 8 Wend., 481, 484.
DeWitt vs. Hastings, 8 Jones & Spencer (N. Y.) 463,
Domichett vs. Stinson, 63 Mo., 277, 279.
Harriman vs. Southan, 16 Ind., 190.

Where the foreign corporation has not complied with the prohibitary law it is held "as to this State, or any transactions therein, is neither a corporation de jure nor de facto. It has never acquired the right to exist here," and there is no estoppel.

Sample vs. Bank, 5 Sawyer, 92, 93,
Empire Mills vs. Austin Grocery Co. (Tex.)
15 S. W. Rep. 505 (12 L. R. A., 369).

In Lamb vs. Lamb, 6 Biss., 424, the court held the prohibitory law applied as well to mutual companies as to others, as the same prohibition was needed against all.

In Re. Comstock, 3 Sawyer 227, holds there is no estoppel where the prohibitory law has not been complied with.

"A person who transacted business within the State with an unregistered foreign corporation is not estopped to plead its non-registration to avoid the contract, even though the corporation was induced to act on the strength of his contract, because the defense that the contract 'was against public policy is superior to the private right.'"

Wildwood Pavilion Co. vs. Hamilton, 22 Pa. Co. Ct. R. 68 (7 Pa. Dist., R. 747).
43 W. N. C., 303, cited in American Digest 1899, page 1050 (284 b).

"The non-enforcement of illegal contracts being a matter of "public interest, a party thereto cannot by stipulations, either "at the time of the execution of the contract or afterward, "waive his right to set up the defense of illegality in any ac- "tion thereon by the other party. The same rule of public "policy which forbids the execution of the contract forbids the "giving of a quasi validity thereto by the waiver of such de- "fense.

1014 15th Am. and Eng. E. of Law, 2d Ed.

"A party must first be in a position to assert a right before "he can maintain it by estoppel."

1015 Ib.

The case at bar is like McCormick vs. Market Bank, 165 U. S., 553, where the Court said: "The present case is not one of "irregularity of organization or of abuse of a legal power, but "of an attempt to exercise a power expressly prohibited by "statute." The Court said: "The lease is void—cannot be made good by estoppel."

The Eastern B. and L. Association had no authority to transact any business in Tennessee.

Where a contract is illegal "there can be no waiver. The "defense is allowed not for the sake of the defendant, but of "the law itself. The principle is indispensable to the purity "of its administration. It will not enforce what it has forbid- "den and denounced."

Coppell vs. Hall, 7 Wall., 558.
Oscanyan vs. Arms Co., 103 U. S., 268.
Embry vs. Jamison, 131 U. S., 349.

In First National Bank of Concord vs. Hawkins, 174 U. S., 371, the Court quotes from Central Transportation Co. vs. Pullman, 139 U. S., 54-60, as follows:

"When a corporation is acting within the general scope of "the powers conferred upon it by the Legislature the corpora- "tion as well as persons contracting with it may be estopped to "deny that it has complied with the legal formalities which "are prerequisite to its existence or to its action because such "prerequisites might in fact have been complied with. But "when the contract is beyond the powers conferred upon it by "existing laws neither the corporation nor the other party to "the contract can be estopped by assenting to it or by acting "upon it to show that it was prohibited by these laws."

The Court (174 U. S., 371) continues: "The principles there "asserted are directly applied in the case of California Nat. "Bank vs. Kennedy, 167 U. S., 367, where the question and the "answer were thus stated by Mr. Justice White: 'The transfer "of the stock in question to the bank being unauthorized by "law, does the fact that under same circumstances the bank "might have legally acquired stock in the corporation estop "the bank from setting up the illegality of the transaction? "Whatever divergence of opinion may arise from conflicting "adjudications in some of the State Courts in this Court, it is "settled in favor of the right of the corporation to plead its "own want of power—that is to say, to assert the nullity of an "act which is an *ultra vires* act.' The cases recognized as "sound doctrine that the powers of corporations are such only "as are conferred upon them by statute." In the above case the Court declined to follow the suggestion that the liability of a stockholder was statutory, not contractual, saying: "As "the ownership of the stock in most cases arises from the vol-

"untary act of the stockholder he must be regarded as having "agreed or contracted to be subject to the obligation."

See also

De La Vergne R. M. Co. vs. German Sav. Inst., 175 U. S., 59.

McMullen vs. Hoffman, 174 U. S., 670.

It will be remembered that the by-laws of the Eastern B. and L. Association only authorized it to do business in the States "where no legal prohibition exists." (See Art. 1, Sec. 3, Record, p. 55.) If such association had contracted to loan money to Bedford it could not have been forced to do so in the face of this prohibition and of the prohibitory laws of Tennessee.

In Wagerhauser vs. Minnesota, 176 U. S., 559, the Court held: "Whether a party in a case has been given or refused the "benefit of the law of estoppel involves no Federal question."

In the case of Sioux City T. R. & U. Co. vs. Trust Co., 173 U. S. 112, the Court declined to notice the question of estoppel, "since it rests upon an assumption that the Court of Iowa has "decided that the corporation was by estoppel prevented from "complaining of a void act. But the Supreme Court of Iowa "has not so decided."

Now, the decisions of the Supreme Court of Tennessee, holding contracts like the one in question herein void, are based on the illegality of the transactions, and not upon any question of estoppel.

THE LOAN WAS USURIOUS.

If the transactions in question were otherwise legal, the loan was usurious. In making the loan of $4,600 Bedford was required to pay a fixed premium of $460, and received only $4,140. Receiving a fixed premium for a loan of money is usury in Tennessee and in most of the States.

McCauley vs. Workingman's B. & L. Assn., 97 Tenn., 421.

35 L. R. A., 224 and note.

Post vs. Association, 97 Tenn., 408.

When Bedford was required (Record, p. 63) to withdraw his stock and receipt in full he could get no benefit from future profits of the association. The transaction was the borrowing of a fixed sum, to be repaid at a fixed time. In Hubbell's Legal Directory of 1897, page 482, it is said "the legal rate of in- "terest (in New York) is 6 per cent. All instruments (except "bottomry and respondentia bonds and contracts) and all de- "posits of goods, or other things whereupon or whereby a "greater rate is reserved, taken or secured, are absolutely void.

"even in the hands of innocent third parties."

The legal rate of interest in Tennessee is 6 per cent. per annum, "and any excess over that rate is usury."

Section 3493, Shannon's Code of Tennessee.

It is not usury where the agreement to pay above the legal rate depends upon a contingency.

Spain vs. Hamilton, 1 Wall., 604.

Patterson vs. B. & L. Assn., 14 Lea (Tenn.), 690, 694, 695.

McCauley vs. B. & L. Assn., 97 Tenn., 431, 433, 435.

Where, however, the party withdraws his stock and loses all interest in the profits of the association the loan is fixed and certain, and no element of contingency remains.

This doctrine is recognized in New York.

In Citizens' M. L. Assn. vs. Webster, 25 Barb., 268, the Court said: "These payments are to be made only until the termina- "tion of the said association. The duration of the association "is uncertain. It will continue till a fund has been accumu- "lated sufficient to pay to every holder of unredeemed shares, "the nominal or par value of the shares being the sum of "$800. Whether the payments required to be made by this "bond in order to prevent forfeiture will exceed the principal "and legal interest of the amount advanced to the defendant "will depend upon matters not brought before the Court, either "upon the pleadings or the proof. *If the principal was payable "absolutely there would be no doubt of the usury.*"

See also

B. & L. Co. vs. Fatty, 1 Abbott, N. Y. Ct. of Appeals, 350.

In Melville vs. Am. B. B. Association, 33 Barb. 113, 114, the Court said "Upon the making of said first mentioned mort- "gage, although still (as I understand the effect of the arti- "cles) nominally a member of the association his only rela- "tion thereto was that of a debtor. Upon no possible contin- "gency could he have any beneficial interest by reason of "these shares in the property of the association. And the "same may be said as to each of the other redemptions. Since "the making of the last mortgage the plaintiff had not had "(so far as appears) any interest in the concern."

The Court held that as the payments were to continue longer than sufficient to pay principal and interest that the transaction was usurious.

The transaction should be governed by Tennessee law. Section 9 of Chapter 31 of Acts of Tennessee of 1877, provides as to charters of foreign corporations doing business in Tennessee "all such parts thereof as may be found to be in conflict "with the laws of the State shall be null and void."

If the Eastern Building and Loan Association, by its charter or the laws of New York, was allowed to loan money upon fixed premiums, or to loan to members while excluding them from participation in profits, and was allowed to exclude all uncertainty and contingency by maturing the stock at a fixed time, yet it could not do this in carrying on business in Tennessee, as the Tennessee law did not allow this. The whole contract was permeated with usury, as 5 per cent. "premium," alias for interest, and 5 per cent. interest were charged in addition to the fixed premium of $460.

"A corporation has no implied authority to do any act in "a foreign State which is not permitted by the law of the "latter to individuals generally."

Par. 694, 695, 2d Morawitz on Private Corporations.
Clark vs. R. R., 50 F. R., 338,
Rhodes vs. M. I. & L. Co., 173 Ill., 621.
42 L. R. A., 93.

"That which a State may do with corporations of its own "creation it may do with foreign corporations admitted into "the State."

Orient Ins. Co. vs. Daggs, 172 U. S., 567.

"The spirit of comity does not require that a non-resident "shall be allowed a remedy which is by the policy of the law "denied to its own citizens."

Rube vs. Buck (Mo.), 25 L. R. A., 178.
Williams vs. Gold Hill M. Co., 96 F. R., 454.
Sokoloski vs. N. S. B. & L. Association, 26 So. Rep. (Miss.) 361.
Crofton vs. N. S. B. & L. Association, 26 So. Rep. (Miss.) 362,

Making the notes payable in New York was an attempted evasion of Tennessee law, as the business was being carried on in Tennessee.

U. S. Sav. & Loan Association vs. Scott (Ky.), 34 S. W. Rep., 236; 98 Ky., 695.
Martin vs. Johnson, 8 L. R. A., 170 (84 Ga., 481).
Banks vs. Flint, 10 L. R. A., 460 (54 Ark., 40).
Thompson vs. Edwards, 85 Ind., 414.
Andrews vs. Pond, 13 Peters, 78.

The Court's especial attention is called to the cases of Marony vs. Association, 116 N. C., 882 (47 Am. St., Rep. 841) and McIlwain vs. Iseley, 96 F. R., 68.

When it is remembered that the stock issued to Bedford matured at a fixed time, that he was to pay fixed sums and that he was forced to withdraw his stock and receipt in full, it is evident that the transaction was not in accordance with the principles applicable to building and loan associations

and that the transaction should be treated as a plain loan of money. When such is the case the party should be charged only with what he got and be credited with all payments made by him in full.

Wilber vs. Association, 45 Md., 547,
Kuppert vs. Gullenberg Association, 30 Pa. St., 465.
Hughes' Appeal, 30 Pa., 471.
Overly vs. F. B. & L. Association, 81 N. C., 56.
Hanner vs. G. B. & L. Association, 78 N. C., 188.
Price vs. Empire L. Association, 75 Mo. App., 551.

The bill herein (Record p. 5) treats Bedford's stock as canceled and wants a complete settlement. In such cases all payments should go as a credit on the debt, including payments on stock.

Randall vs. N. B. L. & P. Union, 29 L. R. A., 136 (42 Nebraska, 809).
Tilley vs. Am. B. & L. Association, 52 F. R., 618 (Ark.).

When Bedford got nothing but so much money, and is deprived of all benefits of the association, it is evident that the so-called "premium" is simply a cover for interest.

In 94 Ga., 562, the Court calls "premiums" mere "fancy "names, carefully eschewing the name of interest, which said "charges really are."

The Eastern B. & L. Association was carrying on business generally in Tennessee. If the notes had been payable in Tennessee they would clearly have been usurious. The association, carrying on business in Tennessee, cannot evade the usury laws of Tennessee by taking obligations payable elsewhere. The case is not like or governed by Pioneer Loan Co. vs. Cannon, 96 Tenn., 600. In that case the company was not doing business in Tennesee and the contracts were not made in Tennessee.

Respectfully submitted,
HEBER J. MAY,
ROBERT M. HEATH,
W. C. McLEAN,
Attorneys for H. L. Bedford and Lou M. Bedford.

ADDENDA.

COPY OF ACTS OF TENNESSEE.

CHAPTER XXXI.

'AN ACT to declare the terms on which Foreign Corporations organized for mining or manufacturing purposes may carry on their business, and purchase, hold and convey real and personal property in this State.

Section 1. Be it enacted by the General Assembly of the State of Tennessee, That corporations chartered or organized under the laws of other States or countries, for the purpose of mining ores or coals, or of quarrying stones or minerals, of transporting the same, or erecting, purchasing or carrying on works for the manufacture of metals, or of any articles made of or from metal, timber, cotton or wool, or of building dwelling houses for their workmen and others, or gasworks, or waterworks, or other appliances designed for the promotion of health, good order, or general utility, in connection with such mines, manufactories and dwelling houses, may become incorporated in this State, and may carry on in this State the business authorized by their respective charters, or the articles under which they are or may be organized and may enjoy the rights and to do the things therein specified, upon the terms and conditions, and in the manner and under the limitation herein declared.

Sec. 2. Be it further enacted, That each and every corporation created or organized under or by virtue of any government other than that of this State, of the character named in the first section of this act, desiring to carry on its business in the State, must first file in the office of the Secretary of State, a copy of its charter or aticles of association, certified in the manner directed by law for the authentication of the statutes of the State or country under whose laws such corporation is chartered or organized, and must cause an abstract of the same to be recorded in the office of the register of each county in which such corporation proposes to carry on its business or to acquire any lands.

Sec. 3. Be it further enacted, That such corporations shall be deemed and taken to be corporations of this State, and shall be subject to the jurisdictions of the courts of this State, and may sue and be sued therein in the mode and manner that is, or may be, by law directed in the case of corporations created or

organized under the laws of this State.

Sec. 4. Be it further enacted, That such corporations may purchase, acquire and hold real estate in fee or any other interest less than the fee, and personal property of every kind; as they may deem necessary or suitable for the carrying on of the business specified in their said charters or articles of association, filed as aforesaid with the Secretary of State, and may sell, lease and convey such real estate as natural persons may do. And the State of Tennessee does hereby release its right of escheat by virtue of the alien origin of such corporations or the alienage or non-residence of the shareholders of such corporation, or any of them.

Sec. 5. Be it further enacted, That the corporations, and the property of all corporations coming under the provisions of this act, shall be liable for all the debts, liabilities and engagements of the said corporations to be enforced in the manner provided by law, for the application of the property of natural persons to the payment of their debts, engagements and contracts. Nevertheless creditors who may be residents of this State shall have a priority in the distribution of assets, or subjection of the same, or any part thereof, to the payment of debts over all simple contract creditors, being residents of any other country or countries, and also over mortgage or judgment creditors, for all debts, engagements and contracts which were made or owing by the said corporations previous to the filing and registration of such valid mortgages, or the rendition of such valid judgments. But all such mortgages and judgments shall be valid, and shall constitute a prior lien on the property on which they are or may be charged as against all debts which may be incurred subsequently to the date of their registration or rendition. The said corporations shall be liable to taxation in all respects the same as natural persons resident in this State, and the property of its citizens is or may be liable to taxation; but to no higher taxation, nor to any other mode or valuation, for the purpose of taxation; and the said corporations shall be entitled to all such exemptions from taxation which are now or may be hereafter granted to citizens or corporations for the purpose of encouraging manufactures in this State or otherwise.

Sec. 6. Be it further enacted, That such of said corporations as shall engage in the mining of coals, iron ore or other minerals, and in the manufacture of iron and other metals, shall have the right to construct and maintain roads, bridges, canals, tramways, telegraph lines and railroads between their mines and their places of manufacture, and for purposes of inlet or outlet to or from any railroad now or hereafter to be constructed, or to any river or waterway at the point or place most con-

venient for its operation and its business, and for this purpose such a corporation may purchase or acquire the necessary rights of way by contract with the owner or owners of the said lands on which the right of way is desired.

Sec. 7. Be it further enacted, That all corporations coming under the provisions of this act, shall in good faith and truly, within one year after filing with the Secretary of State the certified copy of the charter or articles of association as hereinbefore provided, begin and proceed with the business described in the said charter or articles of association so filed, and shall in good faith continue the same under the powers of said corporation in this said charter or articles of association as in this act declared; it being a chief object of this act to secure the opening and development of the mineral resources of the State, and to facilitate the introduction of foreign capital, and upon the failure of any such corporation to commence in good faith to develop and work some portion of its property within this State within one year after filing its said charter or articles of association in the office of the Secretary of State, all rights and privileges conferred by this act shall lapse and become void and of no effect.

Sec. 8. Be it further enacted, That any corporation obtaining and having the privileges of this act, may establish towns, villages or settlements for the use and residence of its employes, and others, on any lands acquired by virtue of this act, and until the population is sufficiently large for the formation of municipal corporations in any of such towns or villages, may establish such regulations for the government thereof as shall not be inconsistent with the laws of this State; and it shall not be lawful for any person or persons (except for medical uses as evidenced by the written order of some duly certified medical practitioner), nor for any corporation, to distill, have make, sell, barter, or give away, any spirituous liquor or intoxicating drink of any kind, whether described as "bitters," or by any other name that may be used to disguise its real nature, or to evade the provisions of this act, upon any lands acquired by any corporation under this act, nor within a radius of five miles (except within the boundaries of an incorporated town), from any mine or quarry, or of any furnace, rolling mill, foundry, or factory of any kind, established or purchased by any corporation under this act, so long as such mine, quarry, furnace, rolling mill, foundry or factory is actually worked, or held for the purpose of being worked, or whilst under construction, and all the provisions and restrictions of chapter 112 of the Acts of the Legislature of Tennessee, 1871, passed 14th of December, 1871, are hereby declared applicable to all corporations organized under this

act; and all persons violating any of the provisions of this section of this act, shall be punished as declared in the said act of 1871,

Sec. 9. Be it further enacted, That if any such charter or articles of association, or any part thereof, filed as aforesaid in the office of the Secretary of State, should be in contravention or violation of the laws of this State, all such parts thereof as may be found to be in conflict with the laws of this State shall be null and void.

Sec. 10. Be it further enacted, That this law shall take effect from the date of its passage, the public welfare requiring it.

Passed March 19, 1877.

EDWIN T. TALLIAFERRO,
Speaker of the House of Representatives.

HUGH M. McADOO,
Speaker of the Senate.

Approved March 21, 1877.

JAMES D. PORTER,
Governor.

CHAPTER 95.

AN ACT to amend an Act entitled "An Act to declare the terms on which foreign corporations, organized for mining or manufacturing purposes, may carry on their business and purchase, hold and convey real and personal property," Chapter 31 of Acts of 1877, Sections 1992 to 2003 of Millikin & Vertres' compilation of the laws of Tennessee.

Section 1, Be it enacted by the General Assembly of the State of Tennessee, That Chapter 31 of the Acts of the General Assembly of Tennessee for the year 1877, being Sections 1992 to 2003 of Milliken & Vertrees' compilation of the laws of Tennessee, be so amended as to apply to corporations chartered under the laws of other States known as "Building and Loan Associations," "Bonds and Investment Companies," "Real Estate, Land, Labor and Immigration Companies," "Co-operative Associations or Companies," "Cotton Compress and Warehouse Associations or Companies," "Electric Light, Gas and Electric Power, Gas Power and Steam Power Companies," "Stock Yards," "Cold Storage and Packing Companies," "Water-Works" and "Wrecking and Salvage Companies."

Sec. 2. Be it further enacted, That this Act take effect from and after its passage, the public welfare requiring it.

Passed March 10, 1891.

W. C. DISMUKES,
Speaker of the Senate.
THOMAS R. MYERS,
Speaker of the House of Representatives.

Approved March 17, 1891.

JOHN P. BUCHANAN,
Governor.

CHAPTER 122.

AN ACT to amend Chapter 31 of the Acts of 1877, declaring the terms on which foreign corporations organized for mining or manufacturing purposes may carry on their business and purchase, hold and convey real and personal property in this State, so as to make the provisions of said Act apply to all foreign corporations that may desire to own property or to do business in this State.

Section 1, Be it enacted by the General Assembly of the State of Tennessee, That Chapter 31 of the Acts of 1877 be so amended and enlarged as that the provisions of said Act shall apply to all corporations chartered or organized under the laws of other States or counties for any purpose whatsoever which may desire to do any kind of business in this State.

Sec. 2, Be it further enacted, That each and every corporation created or organized under or by virtue of any government other than that of this State, for any purpose whatever, desiring to own property or carry on business in this State of any kind or character, shall first file in the office of the Secretary of State a copy of its charter and cause an abstract of same to be recorded in the office of the Register in each county in which such corporation desires or proposes to carry on its business or to acquire or own property, as now required by Section 2 of Chapter 31 of Acts of 1877.

Sec. 3. Be it further enacted, That it shall be unlawful for any foreign corporation to do or attempt to do any business or to own or to acquire any property in this State without having first complied with the provisions of this Act, and a violation of this statute shall subject the offender to a fine of not less than $100 nor more than $500, at the discretion of the jury trying the case.

Sec. 4. Be it further enacted, That when a corporation complies with the provisions of this Act it shall then be, to all intents and purposes, a domestic corporation, and may sue and be sued in the courts of this State, and subject to the juris-

diction of the courts of this State just as though it were created under the laws of this State.

Sec. 5. Be it further enacted, That when such corporation has no agent in this State upon whom process may be served by any person bringing suit against such corporation, then it may be proceeded against by an attachment to be levied upon any property owned by the corporation, and publication, as in other attachment cases. But for the plaintiff to obtain an attachment he, his agent or attorney, need only make oath of the justness of his claim, that the defendant is a corporation organized under this Act, and that it has no agent in the county where the property sought to be attached is situated upon whom process can be served.

Sec. 6. Be it further enacted, That said Chapter 31 of the Acts of 1877, except in so far as the same is amended, enlarged and extended by this Act, be and the same is declared to be in full force.

Sec. 7. Be it further enacted that this Act take effect from and after its passage, the public welfare requiring it.

Passed March 21, 1891.

THOMAS R. MYERS,
Speaker of the House of Representatives.
W. C. DISMUKES,
Speaker of the Senate.

Approved March 26, 1891.

JOHN P. BUCHANAN,
Governor.

CHAPTER 2.

AN ACT to regulate the business of Building and Loan Associations.

Section 1. Be it enacted by the General Assembly of the State of Tennessee, That every building and loan association heretofore or hereafter incorporated under the laws of this State, which loans its funds outside of the county in which it has its domicile, shall deposit and keep on deposit with the Treasurer of the State, or with a trust company legally incorporated and duly organized under the laws of this State, to be selected by the Board of Directors of such association, in trust for all its members and creditors, mortgages (or other securities), received by it in the usual course of its business, amounting to not less than twenty-five thousand ($25,000) dollars nor more than fifty thousand ($50,000) dollars, at the discretion of the State Treasurer. When such mortgages (or other securities) are deposited with the said trust company, such company shall certify to the Treasurer of the State that

the said securities have been and are deposited with it under this act, and the same shall not be surrendered to or returned to the said building and loan association without the authority or sanction of the said Treasurer of the State. Provided, that every such corporation heretofore organized, whose mortgages or other securities so deposited do not amount to twenty-five thousand ($25,000) dollars, shall, within six months from the passage of this act, deposit with the Treasurer of the State, or trust company, such additional securities as, with the securities so deposited, shall equal in value the sum of twenty-five thousand ($25,000) dollars; and every such corporation hereafter organized, before com- the president and treasurer of some responsible trust company, certifying that it has on deposit securities, not less than $25,000, taken in the regular course of business, as mentioned in this act, in trust for all the members and creditors of such building and loan association.

Third. File with the State Treasurer a duly authenticated copy of a resolution adopted by the board of directors of such association, stipulating and agreeing that if any legal process affecting such association be served on said State Treasurer, and a copy thereof be mailed, postage prepaid, by the party procuring the issuing of the same or his attorney to said association, addressed to its home office, then such service and mailing of such process shall have the same effect as personal service on said association of this State.

Fourth. Pay the State Treasurer twenty-five ($25) dollars as fees for filing the papers mentioned in this section.

Sec. 4. Be it further enacted, That when process against or affecting any foreign building and loan association is served on the State Treasurer, the same shall be by duplicate copies, one of which shall be filed in the office of said State Treasurer, and the other by him immediately mailed, postage prepaid, to the home office of said association. The word process in this act shall include any writ, summons, complaint, declaration or order whereby an action, suit or proceeding shall be commenced, or which shall be issued in or upon any action, suit or proceeding at law or in equity authorized by law in this State.

Sec. 5. Be it further enacted, That when by the laws of any other State, Territory or nation, any taxes, fines, penalties, licenses, fees, deposits of money, securities or other obligations or prohibitions are imposed on building and loan associations of this State doing business in such other State, Territory or nation, or upon their agents therein, so long as such laws continue in force, the same obligations or prohibitions of whatever kind shall be imposed upon all building and loan associations of such other State, Territory or nation, doing business in this State, and upon their agents here.

Sec. 6. Be it further enacted, That the name "Building and Loan Association," as used in this act, shall include all corporations, societies, or organizations, or associations doing a savings and loan investment business on the building society plan, viz.: Loaning its funds to its members, whether issuing certificates of stock which mature at a fixed time in advance or not.

Sec. 7. Be it further enacted, No officer, director or agent of any foreign building and loan association shall, in this State, solicit subscriptions to the stock of such association, or sell, or knowingly cause to be sold or issued, to a resident of this State any stock of an association while said association has not on deposit securities as required by section 3 of this act, or before said association has complied with all the provisions of this act. License to agents of such companies or associations shall be issued by the treasurer, annually, on the first of January, and said treasurer is authorized to collect from each agent for said license $2 fee. Any violation hereof shall be deemed a misdemeanor, and upon conviction shall be punished by a fine of not less than $10 or more than $50.

Sec. 8. Be it further enacted, No officer, director or agent of any building and loan association incorporated under the laws of this State shall sell, issue, or knowingly cause to be sold or issued to any person not a resident of the State, in which the home office of said association is located, any stock of said association, while said association does not have on deposit securities as required by section 1 of this act. Any violation hereof shall be deemed a misdemeanor, and, upon conviction, the offender shall be punished by a fine of not less than $100, nor more than $500, or by imprisonment not less than ten days or more than six months, or by both, such fine and imprisonment, in the discretion of the court.

Sec. 9. Be it further enacted, That on or before the first day of September in each year every building and loan association doing business in this State, and governed by this act, shall deposit with the Treasurer of the State a report of its affairs and operations for the year ending on the 30th day of June immediately preceding; such report shall be verified under oath by the president and secretary, or by three directors of the association, and shall contain answers to the following questions:

First. The date when the association was incorporated and par value of each share of stock.

Second. The number of shares sold during the year.

Third. The number of shares cancelled and withdrawn during the year.

Fourth. The number of shares in force at the end of the year.

Fifth. A statement of the receipts and disbursements of the loan fund during the year.

Sixth. A statement of the assets and liabilities at the end of the year.

Such association shall pay to the Treasurer of the State $50 on filing such report. If any such association shall wilfully fail to furnish to the Treasurer of the State any report required by this act, at the time so required, it shall, in the discretion of the State Treasurer, forfeit the sum of twenty-five ($25) dollars per day for every day such report shall be delayed or withheld, and the Treasurer of the State may maintain an action in his name of office to recover such penalty, and the same shall be paid into the Treasury of the State for the benefit of the State.

Sec. 10. Be it further enacted, That every association depositing securities with the Treasurer of the State, as provided for in this act, shall annually pay to said Treasurer of State a fee of fifty ($50) dollars.

Sec. 11. Be it further enacted, That it shall be the duty of the State Treasurer, once in each year, at such time as he may select, to examine the books and verify the statement of each association governed by this act, doing business under the laws of this State.

Sec. 12. Be it further enacted, That all of the officers of any building and loan association governed by this act, and doing business in this State, who handle any of the funds of such associations, shall give sufficient bonds for the faithful performance of their duties as the board of directors may require, and no such officer shall be deemed qualified to enter upon the duties of his office until his bond is approved by the board of directors, with whom such bonds shall be filed; provided that the State Treasurer may require of any association, at any time, such increase of said bond, or additional sureties thereto, or such increase of said insurance as he may deem necessary for the protection of the members. The penalty for a failure of any association to file and maintain the bonds or policy, as required by the provisions of this section, shall be a fine of one hundred ($100) dollars for each day such association transacts business after such bond has become due under the provisions of this act, said bond or policy shall be held in trust for the benefit and protection of the members of such association, shall, subject to the provisions of section 1 of this act, be surrendered upon request to the association depositing the same for the purpose of making such deposit. No securities required to be withdrawn by said association from the said Treasurer of the State, or trust company, shall be withdrawn except upon filing with the said Treasurer of the State, before the same are surrendered, an affidavit of the president

and secretary of the association, stating the reason for desiring to withdraw such securities and such securities shall not be used for any purpose other than that stated in said affidavit.

Sec. 3. Be it further enacted, That no building and loan association organized under the laws of any other State, Territory or foreign government shall do business in this State unless said association shall (deposit and continually thereafter) keep deposited in trust for all of its members and creditors, with some responsible trust company, or with some State officer of this or some other State of the United States, mortgages (or other securities) received by it in the usual course of its business, amounting to not less than twenty-five thousand ($25,000) dollars nor more than fifty thousand ($50,000) dollars, at the discretion of the State Treasurer. All of the personal obligations of its members taken in the ordinary course of business of such association and secured on first mortgage on real estate, all dividends and interest which may accrue on securities held in trust, as aforesaid, by the trust company or the State, as provided herein, and all dues or monthly payments which may become payable on stock pledged as securitty for loans, the mortgages for which are on deposit in accordance with the provisions of this act, may be collected and retained by the association depositing such securities or mortgages, so long as such association remains solvent, and faithfully performs all contracts with its members. Any securities on deposit, as provided herein, may from time to time be withdrawn, if others of equal value are substituted therefor. Every building and loan association organized under the laws of any State, Territory or foreign government shall, before commencing to do business in this State—

First. File with the Treasurer of this State a duly authenticated copy of its charter or articles of incorporation.

Second. File with the Treasurer of this State the certificate of the proper State officer of another State, or mencing to do business, shall deposit with the said Treasurer of the State, or trust company, in trust, as aforesaid, securities of the value of twenty-five thousand ($25,000) dollars. The securities mentioned in this proviso shall consist of bonds or Treasury notes of the United States, national or State bank stocks or bonds of this State, or any other State of the United States, or of any solvent city, county or town of this State, or of any State of the United States having legal authority to issue the same, or first mortgages on real estate, or other legal securities aggregating in value twenty-five thousand ($25,000) dollars, and such securities may be withdrawn from time to time when mortgage securities of corresponding value shall be deposited in lieu and place thereof as provided in this act, or when other securities of

like character and value are substituted thereof, and it shall be the duty of the Treasurer of the State to examine the affairs of the said association from time to time to ascertain whether said associations have deposited all their securities and otherwise complied with the requirements of this act.

Sec. 2. Be it further enacted, That all interest and dividends and premiums which may accrue on securities held by the Treasurer of the State, or such trust company as provided herein, and all dues or monthly payments which may become payable on stocks pledged as security for loans, the mortgages for which are so deposited in accordance with the provisions of this act, may be collected and retained by the association depositing such securities as mortgages, so long as such association remains solvent and faithfully performs all contracts with its members, and when any mortgage shall have been fully paid to said corporation, the same shall be surrendered by said Treasurer of the State or under his order, upon filing with him a certificate of the register of deeds of the county where the real estate is situated, to the effect that the satisfaction of such mortgage has been filed of record. Any mortgage upon which default in the payment due has been made shall be surrendered to or returned to the said building and loan association as aforesaid, for the purpose of collection or foreclosure. Bonds or stocks deposited with said Treasurer of the State, or trust company as aforesaid, shall, if deemed advisable by the association, be surrendered to the association depositing the same, for the purpose of being converted into cash and loaned on real estate. Securities needed for deposit in any other State, Territory ciation and shall be enforceable by any member whenever cause of action shall accrue thereon.

Sec. 13. Be it further enacted, That this act shall take effect and be in force after its passage, provided that any association heretofore incorporated under the laws of this State, and subject to section 1 of this act, not having at the time this act takes effect securities to the amount of twenty-five thousand ($25,000) dollars, may have until October 1, 1891, in which to make the deposit of said sum, as provided in section 1 of this act. All acts or parts of acts inconsistent herewith are hereby repealed.

Passed March 26, 1891.

W. C. DISMUKES,
Speaker of the Senate.
THOS. R. MYERS,
Speaker of the House of Representatives.

Approved March 28, 1891.

JOHN P. BUCHANAN,
Governor.

CHAPTER 226.

AN ACT to Subject Foreign Corporations to Suit in This State.

Section 1. Be it enacted by the General Assembly of the State of Tennessee, That any corporation claiming existence under the laws of any other State ,or of any country foreign to the United States found doing business in this State, shall be subject to suit here, to the same extent that corporations of this State are, by the laws thereof, liable to be sued so far as relates to any transaction had in whole or in part within this State, or any cause of action arising here, but not otherwise.

Sec. 2. Be it further enacted, That any corporation having any transaction with persons or having any transaction concerning any property situated in this State, through any agency whatever, acting for it within the State, shall be held to be doing business herewithin the meaning of this act.

Sec. 3. Be it further enacted, That process may be served upon any agent of said corporation found within the county where the suit is brought, no matter what character of agent such person may be; and in the absence of such an agent, it shall be sufficient to serve the process upon any person, if found within the county where the suit is brought, who represented the corporation at the time the transaction out of which the suit arises took place, or if the agency through which the transaction was had be itself a corporation, then upon any agent of that corporation upon whom process might have been served if it were the defendant. The officer serving the process shall state the facts, upon whom issued, etc., in his return, and service of process so made shall be as effectual as if a corporation of this State were sued, and the process has been served as required by law; but in order that defendant corporation may also have effectual notice, it shall be the duty of the clerk to immediately mail a copy of the process to the home office of the corporation by registered letter, the postage and fees for which shall be taxed as other costs. The clerk shall file with the papers in the cause a certificate of the fact of such mailing, and make a minute thereof upon the docket, and no judgment shall be taken in the case until thirty (30) days after the date of such mailing.

Sec. 4. Be it further enacted, That it shall be the duty of the plaintiff to lodge at the home office of the company, with any person found there, a written notice from him or his attorney, stating that such suit has been brought, accompanied by a copy of the process and the return of the officer thereon, of which fact affidavit shall be made by the person lodging the same, stating the facts and with whom the notice was lodged.

or else the plaintiff or his attorney shall make an affidavit that he has been prevented from serving such notice by circumstances which should reasonably excuse giving it, which circumstances the affidavit of the plaintiff or his attorney shall particularly state; and no judgment shall be taken until one or the other of these affidavits shall be filed and the court be satisfied that the notice has been given the defendant, or that the excuse for not doing so be sufficient.

Sec. 5. Be it further enacted, That this act shall take effect from and after its passage, the public welfare requiring it.

Passed March 28, 1887.

W. L. CLAPP,
Speaker of the House of Representatives.
Z. W. EWING,
Speaker of the Senate.

Approved March 29, 1887.

ROBT. L. TAYLOR,
Governor.

Supreme Court of the United States,

OCTOBER TERM, 1900.

H. L. Bedford and Lou M. Bedford,

vs.

The Eastern Building and Loan Associatin of Syracuse, N. Y.

NO. 153.

ADDITIONAL BRIEF

On Behalf of H. L. Bedford and Lou M. Bedford.

We desire herein to notice certain portions of the brief filed in behalf of the Appellee, the Eastern Building and Loan Association.

The claim made on pages 110-111 of said brief that the Act of Tenn. ch. 2 of 1891 "was repealed without "qualification or limitation" by the Act ch. 114 of 1895 is incorrect. We attach a copy of this Act ch. 114 of

1895 hereto, and invite a comparison of it with the Act ch. 2 of 1891, copied in appendix to previous brief. The Act ch. 114 of 1893 (referred to in Act ch. 114 of 1895) need not be considered as it merely authorized the Treasurer of the State of Tennessee to employ experts to make examinations of Building and Loan Associations which the Act ch. 2 of 1891, had required the State Treasurer to personally make. A comparison of the two Acts, ch. 2 of 1891 and ch. 114 of 1895, shows that the latter Act was to a great extent a mere reproduction and continuance of the former one. Each Act was prohibitory and contracts made under each would be illegal where the foreign corporations had not complied with the terms thereof.

Sec. 3 of ch. 2 of 1891 provides no foreign Building and Loan Association "shall do business in this state "unless" securities of from $25,000 to $50,000 were deposited and all such associations were required "before "commencing to do business in this state" to file (1) copy of charter with State Treasurer; (2) deposit securities with State Treasurer; (3) file with Treasurer resolution authorizing service of process on him; (4) pay Treasurer $25 fee for filing papers.

By section 8 of ch. 114 of 1895 the foreign Building and Loan Association was required "before doing "any business in this State" to "obtain a license from

"the State Treasurer" and to (1) file with Treasurer copy of charter, etc.; (2) file report of financial condition; (3) file instrument appointing Treasurer agent upon whom process could be served; (4) pay fees to Treasurer for license and for filing papers.

The Act ch. 114 of 1895 did not mention any specific deposit of securities as required by it, but section 13 thereof was a reproduction of section 5 of ch. 2 of 1891. Each of these sections made the same prohibitions against corporations of foreign states and required same deposits of securities by them that such foreign states made against Tennessee corporations. Section 7 of ch. 2 of 1891 and section 10 of ch. 114 of 1895 each forbid sales of stock where the terms of each act had not been complied with by the foreign corporations. Section 9 of ch. 2 of 1891 and section 3 of ch. 114 of 1895 each required reports as to the financial condition of the foreign corporations. Section 11 of ch. 2 of 1891 and section 11 of ch. 114 of 1895 each provide for examination of books, statements, etc., of foreign corporations. Sec. 12 of ch. 2 of 1891 and section 6 of ch. 114 of 1895 are as to bonds required and one section is to a great extent a reproduction of the other. The two acts are largely the same with slight modifications and additions, and each act contains to a great extent the same prohibitions.

Each act required copy of charter to be filed with State Treasurer and that such Treasurer should be appointed agent upon whom process could be served, before business could be done in Tennessee. None of the requirements in either act were ever complied with by appellee. About the only material distinction between the two acts is that ch. 114 of 1895 dispensed with the deposit of securities by the foreign Building and Loan Associations unless the states of their domicile required such deposits of securities by Tennessee corporations, in which event the state of Tennessee imposed such additional reciprocal requirements.

On July 1, 1882, the legislature of New York passed an act, being chapter 409. This act covered various classes of corporations, domestic and foreign, including building and loan associations. By section 224 of such act, all such corporations were required to "transfer and assign to the said superintendent (superintendent of the banking department of the State of New York) registered public stocks of the United States or of the State of New York, or of any incorporated city of this state, authorized by the legislature to the amount in value (and to be at all times so maintained by said corporation) of ten per centum on the paid up capital stock of said corporation, now or at any time hereafter, but not less in any case than $50,000, which stocks

must be registered in the name of the superintendent officially as held in trust under and in pursuance to this Act" as security for creditors of said corporations, etc.

This Act of New York (ch. 409 of 1882) continued in force until January 5th 1892, when another Act was passed in its place, being ch. 689. This Act (ch. 689) embraced foreign and domestic corporations, including building and mutual loan corporations, and section 14 thereof provides, "every such corporation hereafter proposing to engage in such business in this State, shall, before engaging in such business, transfer and assign to the superintendent registered public stocks or bonds of the United States or of this State, or of any city, county, town or village, or free school district in this State authorized by the legislature to be issued to the amount in value and to be at all times so maintained by the corporation, of ten per cent. on its paid up capital stock, but not less in any case than $100,000 in cities, the population of which exceeds 500,000 inhabitants." The Act required this transfer of securities to be in the sums of $100,000, $50,000, $30,000 or $20,000, the same being dependent upon the number of inhabitants in the particular city where the business was to be carried on. The Act provides, "such stocks must be registered in the name of the superintendent

officially in the trust," as security for creditors of such corporation.

Section 31 of this Act provides that no foreign corporation "shall transact business in this State without the written permission of the superintendent of banks and another certificate from him stating that such corporation has complied with all the provisions of this chapter applicable to it and with all the requirements of law, and that it is authorized to transact the business within this State specified therein and that such business may be safely intrusted to it."

Section 32 of same Act provides: "No foreign corporation, company or association to which this chapter is applicable, shall transact any business in this State until it has executed and filed with the Superintendent of Banks a written instrument appointing such superintendent its true and lawful attorney, upon whom all process in any action or proceeding by any resident of the State against it may be served with the same effect as if it existed in this State and had been lawfully served with process therein," etc.

It thus appears that the State of New York continually from 1882 prohibited Tennessee Building & Loan Associations from doing business in New York which had not deposited funds or securities in New York and otherwise complied with the terms of the

New York Acts. The Acts of Tennessee, ch. 22, 1891, section 5 and chapter 114 of 1895. Section 13 made the same reciprocal requirements as to New York Building & Loan Corporations in Tennessee. It is thus apparent that continually from the very start New York Building & Loan Corporations have been required to deposit securities in Tennessee before transacting business therein and to meet other requirements, and that in addition to this the Act ch. 2 of 1891, named specifically the amounts of securities required.

The case of New Chatel Asphalt Co. vs. Mayor, etc., 9 Misc. (N. Y. Reports) 376, was decided in 1894, and as to effect of New York prohibitory laws refers to Demorest vs. Flack, 128 N. Y., 217; Hall vs. Bishop, 3 Daly, 109; Bloom vs. Soberski, 8 Misc. Rep., 311; 59 N. Y. State Reports, 277; Laney vs. Granite State Prov. Ass'n., 8 Misc. Rep., 319; 28 N. Y. Supp., 560; Best vs. Bander, 29 How., 489.; DeWitt vs. Brisbane, 16 N. Y., 508; Griffith vs. Wells, 3 Dev., 226; Swords vs. Owen, 34 N. Y., Super. ct. 277. It is claimed on p 117 of appellee's brief that this case(9 Misc., 376) was overruled in 155 New York, 373, 376. That decision, however, was based on the peculiar language of the New York statutes under consideration providing that where foreign corporations had not procured the certificate required, actions could not be maintained

"until it shall have procured such certificate," the court holding that the statute only intended the remedy to be suspended until the certificate had been procured. It is evident that New York courts would construe statutes like the Tennessee statutes exactly as Tennessee courts have done. See p. 61 of former brief and cases referred to in 9 Misc., 376.

It is evident the contracts in question could not become validated unless the Tennessee legislature intended by ch. 114 of 1895 to validate them. That act shows there was no intention to validate previous contracts made in violation of previous statutes. Each act required a copy of the charter to be filed with the State Treasurer and that he should be appointed agent upon whom process could be served, before business could be done in Tennessee. The continuance of the same terms by the last act shows the legislature by substituting one act for the other did not intend to validate any previous illegal contracts. Besides sec. 14 of ch. 114 of 1895 provides that where the terms of the previous acts had been complied with by foreign corporations they should have a certain time to comply with the terms of the act of 1895. If the legislature had intended to validate contracts where foreign corporations had not complied with the acts of 1891, why give this time to corporations that had so complied within which to comply with act of 1895?

Expressio unius est exclusio alterius is a universal maxim in the construction of statutes. says the court in U. S. vs. Arredondo, 6 Peters 725.

All of the legislative acts must be looked to in determining what is the public policy of the state of Tennessee. In Tennessee as shown in the previous brief there are two sets of corporation laws: one is the general corporation law and the other the Building and Loan Association statutes. The Supreme Court of Tennessee expressly held both of these sets of laws were applicable to foreign Building and Loan Associations and that the terms of each set had to be complied with by them.

Myers Mfg. Co. vs. Wetzel, 35 S. W. Rep. 896.

U. S. Sav. & L. Co. vs. Miller, 47 S. W. Rep. 22-24.

In 1895 the general corporation law of Tennessee was amended by Act ch. 81. A copy of this act is attached hereto. Previous to this act the foreign corporations had been required to file its charter with the Secretary of State and to register abstracts of such charter in the various counties. This act (ch. 81) dispensed with the necessity as to the future of registering abstracts of charter in the different counties. This act however (Section 3) expressly says "that this act shall

COPY BOUND CLOSE IN CENTER

not affect any contracts or remedy heretofore made in foreign corporations not having complied with the existing laws on the subject."

Now why should a Building and Loan contract made in violation of the Building and Loan statute be affected by the repeal thereof when all the other contracts made in violation of the generel corporation law were not affected? How could a repeal of one statute validate contracts made in violation of both sets of statutes? Chapters 81 and 114 of 1895 were passed the same day (Apr. 27, 1895). It is incomprehensible that the legislature intended by ch. 81 not to validate previous illegal and intended by ch. 114 to validate them. The various acts are discussed in U. S. Sav. & L. Co. vs. Miller, 4 S. W. Rep. 22.

The statute ch. 114 of 1895 contains many of the provisions of the act ch. 2 of 1891:

"Where a statute repeals another yet contains in it a provision of the former statute identical in substance, it cannot be said that as to that provision there has been any repeal."

Andeny vs. Levy, 57 Miss. 59, citing many authorities including Steamship Co. vs. Joliffe, 2 Wall. 458, 459 where the court held the last statute a mere continuation of the first one, disregarded the express words

repeal and said "the legislature did not intend by the repealing clause of the act of 1864 to impair the right to fees which had arisen under the original act of 1861."

See also Bear Lake Co. vs. Garland, 164 U. S. 1.

"It seems indeed to be the general understanding that the re-enactment of an earlier statute is a continuance, not a repeal, of the latter, even though the latter act expressly repeals the earlier."

Endlich on Interpretation of Statutes, sec. 490;

Sutherland on Statutory Construction, secs. 242-151;

Smith vs. People, 47 N. Y. 331;

McLaughlin vs. Hoover, 1 Oregon 31;

Forbes vs. Board of Health, 27 Fla. 189.

The "re-enactment of a previous statute or a provision of it is construed not to be an implied repeal of the enactment but a continuation thereof so that all interests under the original statute remained unimpaired. An express repeal and a re-enactment of the same act has a similar effect except where an interval of time came between the two legislative operations."

23 A. & E. Ency. of Law 515, 516.

The law is regarded as continuous in such cases.

Mortimer vs. Chambers, 43 N. Y. State 365:

Ely vs. Holton, 15 N. Y. 595:

Matter of Estate of Prime, 136 N. Y. 347:

Where the law is altered by statute pending an action the law as it existed when the action was commenced must decide the rights of the parties unless the legislature by the language used show a clear intention to vary the mutual relation of the parties.

Hitchcock vs. Way, 6 Adolphus & Ellis 943.

We insist further that even if the statute ch. 2 of 1891 had been repealed unconditionally and no other act had been thereafter in existence, still a previously illegal contract would not thereby become legal. All statutes unless expressly provided otherwise are prospective. The statutes in question did not apply simply to remedies—the contracts were affected thereby. This distinction is recognized in section 164 Sutherland Statutory Construction.

Johnson vs. Meeker, 1 Wis. 436.

"In connection with this subject we may observe that an act declared illegal by statutes is not made good by a subsequent repeal of the statute if it was originally illegal. So the repeal of a prohibitory act does not give validity to acts which were invalid under the operation

of the prohibitory act repealed. Thus in New York the Revised Statutes declared that no person unauthorized by law who should practice physic or surgery for any fee or reward should be capable of bringing suit for such fees: in 1844 this was repealed. An action was brought by an unlicensed practioner in 1845 to recover compensation for services rendered in 1840 prior to the repealing act. It was held that the repeal of the previous prohibitory laws had no effect in cases which arose before the passage of that act."

Sedgwick on Stat. and Const. Law, 132 (1st ed.) 112 (2nd ed.)

Bailey vs. Mogg, 4 Denio 60;
Jacques vs. Withy, 1 H. Blackstone 65;
DeSell vs. Lewenthal, 57 Miss. 343;
Andeny vs. Levy, 57 Miss. 58;
Roby vs. West, 4 N. H. 285;
Bauber vs. Mansell, 47 Me. 58;
Hathaway vs. Moran, 44 Me. 67.

The above cases show sales void when made did not become good by repeal of the statute.

In Andeny vs. Levy, 57 Miss., 58, the distinction is shown between cases where the contract is illegal where it is legal, but a penalty is imposed.

Freight claimed by a vessel in a prohibited trade

could not be recovered though the government remitted the penalties.

Petrot Guano Co. vs. Jarnette., 25 Fed. Rep., 677.

"Where a contract is made in express violation of law, a repeal of the prohibitory Act does not impart validity to the contract."

Milne vs. Huber, 3 McLean, 216.
See also Bank vs. Merrick, 14 Mass., 322.
Mitchell vs. Doggett, 1 Fla., 371, quoting Stony Confl. Laws, 205.
Hannay vs. Eve., 3 Cransh. 242.

The cases of In Re Hall, 167 U. S., 38, and Ewell vs. Daggs, 108 U. S.. 143, referred to by appellee, have no application. Each were cases of absolute repeals not of a continuance or modification of a previous law. In Re Hall, 167 U. S., 38, merely decides that where a court got jurisdiction by a certain statute its repeal took it away, and the repealing statute expressly applied to pending suits. Ewell vs. Daggs, 108 U. S., 143, was a case as to usury. The Texas statute as to usury simply avoided interest where usury was charged the contract as to principal being good. The Court held that upon the unqualified repeal of the usury statute the interest as contracted for could be recovered. This principle

is a manifest exception to the general rule that a void contract does not become legal by repeal of a statute. Before such void contract becomes legal the legislature must expressly legalize it. The ground of the distinction is this: Interest and the rate thereof is purely a statutory right.

379-380 11 Am. & E. Ency. of Law.

As parties have the right to contract as to principal and also for its incident interest, the rate of which as to whether usurious or not, is entirely dependent upon statute. Some courts seem disposed to give effect to the contract as to the incident when the only obstacle thereto the statute is removed by repeal. The parties are considered as having contracted for interest and the rate thereof has been recognized by the repeal as proper. It is evident Ewell vs. Daggs would not have been decided as it was if the repealing statute had contained the same prohibitions as the repealed statute. It was a case of unqualified repeal. Ewell vs. Daggs, 108 U. S., 150, refers approvingly to Fletcher vs. Stone, 3 Pick, 250 and recognizes the doctrine that "Acts which are mala in Se * * * are generally regarded as absolutely void in the sense that no right or claim can be derived from them, and Acts which are mala prohibita * * * are void or voidable according to

the nature or effect of the Act prohibited. Fletcher vs. Stone, 3 Pick, 250."

Now Fletcher vs. Stone decides where the Act "concerns the public good" that the contract in violation thereof is void. The case shows the distinction between usury cases where the debtor can be protected by holding the contract voidable at his election and other cases where the contract is void because "the public good" requires it. The Tennessee statutes under discussion concern "the public good" more particularly than the private interest of any special defendant. It is the public policy of the State of Tennessee to exclude foreign corporations who have not complied with the State laws and the only way to exclude them is to hold contracts void made in an unauthorized business. The State certainly never meant for such corporations to be considered as acting legally in carrying on a forbidden business until some particular defendant questioned the validity of one out of many similar transactions. No one could waive the illegality. The distinction between the two classes of cases is shown clearly by the fact that usury must be plead, whereas it is not necessary to plead the prohibitory laws. In Lumber Co. vs. Thomas, 92 Tenn., 594, it is said "the courts will deny any relief upon any illegal contract or transaction whenever its illegality is made to appear, whether in

the pleadings or proof, and will repel the party guilty of the illegality from the court whenever the fact appears." The Tennessee cases hold the contracts in question are void. Even if they were merely voidable, however, the Act ch. 114 of 1895, continued the prohibitions of the previous statute, and as the terms of neither were complied with it cannot be claimed the contract became good.

TENNESSEE LAW.

Appellee's brief p. 107-108 claims the first decision of the Supreme Court of Tennessee construing the statutes in question, was rendered after the contracts had been entered into. This claim is incorrect. Among the statutes violated was ch. 95 of acts of 1891 passed March 10, 1891, before Bedford's application for loan. This act extended the act ch. 31 of 1877 to foreign Building and Loan corporations. The Supreme Court of Tennessee in 1886 passed on the act ch. 31 of 1877 saying, "we do not think that a foreign corporation * * are authorized to carry on business in this state except upon compliance with this act and upon the terms of this act."

Young vs. S. T. L. Co., 85 Tenn. 198.

In commenting on the case of U. S. Savings & Loan Co. vs. Miller, 47 S. W., 17, appellee's brief, p. 115, claims that it was decided therein that "there was

no legal delivery of the bond and mortgage until they reached Minnesota and were approved there." The court said (U. S. S. & L. Co. vs. Miller, 47 S. W., 24) "under the terms of the application for the loan, as shown by 'Hints to Borrowers,' printed on the back thereof, the loan could not become consummate until the final approval was granted by the company's general attorney upon the securities forwarded by the local treasurer and until this indication of that approval to the company's trustee, its paying officer, and this, although the draft had been delivered because its delivery was by the contract subject to the known condition. But in any event it was clear that the draft was not deliverable until May 2, 1895, and that it was not delivered until that time and the contract was, without doubt, in choete until that time."

The present case differs from the Miller case. In the present case it was not a part of the contract or a condition of the papers pertaining thereto that no contract should be concluded until the mortgage and notes were sent on to New York. In loaning money the Eastern Building and Loan Association examined the abstract of title to property offered as security at its home office and if satisfactory had the notes and mortgage then prepared at such home office. Tr. p. 28 (11). The notes and mortgage so prepared by such association

necessarily were its proposition, which was accepted and the contract closed by the signing of such papers by the borrower, in Tennessee.

The claim of appellee that the Miller case contains dicta cannot be sustained. It was necessary to decide therein what constituted doing business in Tennessee. Besides this case is in exact accord with other Tennessee cases.

Ill. B. & L. Ass'n vs. Walker, 42 S. W. Rep. 192;

N. Y. N. B. & L. Ass'n vs. Camon, 99 Tenn. 344.

There is not the slightest conflict in the Tennessee authorities.

The decisions in Morton vs. Union Bank & Tr. Co., 46 S. W. Rep. 544, and Neal vs. New Orleans &c Associations, 100 Tenn. 607, were based on the fact that the corporation had neither office nor agency in Tennessee. In the Farrell case the party was out of Tennessee when the contract was made. In the Massengill case the corporation only had one transaction after the passage of the prohibitory act "and that was done by means of correspondence between Massengill and the bank's officers."

46 S. W. Rep. 546.

In the Massengill case the corporation was not then doing business in Tennessee and the contract was made at its home office without the slightest assistance from any agency in Tennessee.

Appellee (brief p. 137) relies upon Sullivan vs. Beck, 79 F. R. 201, and Farmers L. & T. Co. vs. R. R., 68 F. R. 417, as holding that Federal Courts will enforce contracts notwithstanding the ruling of the State Court. Sullivan vs. Beck merely decided that the state statute itself only forbid the enforcement of contracts "in any court of this state" before the statute had been complied with, and that such phrase did not apply to United States Courts. Farmers L. & T. Co. vs. R. R. hold that the foreign corporations by becoming a trustee in a deed of trust did not violate the state law and that such trustee could foreclose. It was distinctly held that such trustee could not operate the Railroad without first complying with the terms of the state statute.

Appellee in brief p. 82-83 claims that Bedford's right to an "advance" became vested when he became a stockholder in January, 1891, and insists that while the corporation cannot claim the benefit of the privileges and immunities secured to citizens of the several states by the Federal Constitution, yet that Bedford could insist thereon and had the right to call for the

loan in question notwithstanding the Tennessee laws of 1891.

The further claim is made by appellee (brief p. 89) that the notes and mortgage covered "the indebtedness and obligations of Bedford on account of his subscription for stock and therefore both the notes and mortgage are given in part at least to secure the performance of an obligation antecedent to the enactment of the Tennessee laws of March 26, 1891, and antecedent also to the obligations of Bedford growing out of the 'advance' to him granted upon his application of March 20, 1891."

It is also claimed by appellee (brief p. 89) that the notes and mortgage "do not in reality secure the repayment of a loan of money, but only obligate Bedford to comply with the articles of incorporation and by laws of the appellee and make payment to it at its home office in Syracuse of dues upon his stock and premiums and interest upon the 'advance' to him until such time as the stock should mature, at which date he would become entitled to set off the maturity value of his stock against the 'advance' that had been made to him and demand the cancellation of the mortgage."

In response to the foregoing claims we insist upon the following propositions of fact and law:

1. That the notes and mortgage were given expressly in consideration of the loan made by appellee and would not have been given otherwise. They were not made to secure any obligation that Bedford was under by virtue of having stock in the corporation.

Tr. 22-24.

2. The fact that Bedford took stock in the foreign corporation in January, 1891, which was then doing business in Tennessee, did not prevent the State of Tennessee thereafter imposing terms upon such foreign corporations and forbidding it from doing business or loaning money in Tennessee thereafter, when such terms had not been complied with.

3. The fact that Bedford was a stockholder did not give him a vested right to a loan. As stockholder he could withdraw from the association at any time (Tr. p. 61 sec. 19) and whether he withdrew or not there was no fixed right to any loan for any amount. The corporation could not force a loan on him and he could not force one from it.

4. The loaning of the money to Bedford was part of the general business of the corporation carried on in Tennessee and no arrangement between the parties could render such business and contracts therein valid when the law of Tennessee forbid the same.

5. That Bedford as a stockholder had no right to insist on the foreign corporation doing business in Tennessee and transactions with him as a part of such business were void.

6. That if the foreign corporation had the privilege of loaning to Bedford merely because he was a stockholder therein, then such privilege could only be exercised outside of Tennessee and could not be exercised in connection with and as part of business carried on in Tennessee. The proof showed that the Eastern Building and Loan Association made no loan whatever in Tennessee except through its agents and local boards therein and declined to make loans not coming through and endorsed by such agencies.

See statement of facts in previous brief pp. 6-7-8.

7. That when the loaning of money to Bedford was part of a general business admittedly, carried on in Tennessee, and such business had been forbidden by law, the contracts in question were void, because made in Tennessee. If such contracts were closed in New York or were payable therein they were equally void as being manifestly in evasion of Tennessee law as to foreign corporations doing business in Tennessee.

8. The foreign corporation having no right to carry on business in Tennessee when its laws had not

been complied with, cannot work out any equity through H. L. Bedford, and he himself had none in the face of such laws.

9. When the prohibitory laws of 1891 were passed by the legislature of Tennessee, it was the duty of appellee to comply with the terms thereof or to cease doing business in Tennessee; appellee did neither; it kept up the same agencies and local boards in Tennessee. It claimed the right to continue and did continue the loan business in Tennessee, and sought for such business, furnishing its agents in Tennessee with blanks, etc., to be used therein. Appellee explicitly provided and exacted that loans would not be made by it to persons having stock therein, unless the application was endorsed by and came through such local boards and agencies. (See statement of facts in previous brief, p. 6-7-8). If Bedford as stockholder in or member of the Eastern Building & Loan Association had any fixed right or privilege of applying for a loan, as is claimed by appellee, (which is denied) such right or privilege could have been asserted in New York and not in connection with and as part of the illegal business of the corporation in Tennessee, and the assertion of such lawful privilege in such lawful manner was not abrigded by any law of Tennessee. The appellee could not make a bare privilege which a party may have had to

ask for a loan which might or might not have been asserted or granted, the pretext for carrying on an illegal business in Tennessee and for making loans in the course of such business.

There was no contract right to a loan prior to the statutes of 1891, but laws often render performance of contracts illegal, which were legal when made, and prevent performance thereof.

Odlin vs. Ins. Co., 2 Wash. C. C., 312.
Rogers vs. Hoyt, 4 Vt., 172.
Fitzgerald vs. R. R., 13 L. R. A., 70 (Vt.)
Bradford vs. Jenkins, 41 Miss., 336.
Dermott vs. Jones, 2 Wall., 7.
Saunner vs. Ins. Co., 41 Mo. App., 480.
Brick etc. Church vs. City, 5 Cowen, 538.
Hamilton vs. City of Hamilton, 146, U. S., 258.

INTERSTATE COMMERCE.

Appellee in its brief has argued elaborately that it is a question of interstate commerce. We deny this proposition and have considered it, in the previous brief. We insist:

1. That the kind of business carried on by appellee was not interstate commerce or commerce at all.

2. That the business in which and as part of

which the contracts in question were taken, was business carried on within the limits of Tennessee, and transactions therein cannot be considered interstate transactions. In addition to authorities previously referred to we refer to cases decided by Supreme court of the United States in December, 1900.

C. & O. Railway vs. Kentucky.

Williams vs. Fears.

Money and the loaning thereof is a "mere incident."

Appellee had no right to carry on business in Tennessee without complying with the terms of the Tennessee laws. Whenever appellee asks the court to legalize contracts taken in this illeged business, either because of the claim that they were payable in New York or because of the claim that such contracts were techically concluded in New York. We submit it asks the court to aid it in a palpable evasion of the Tennessee law. Of what use is it for states to pass laws as to foreign corporations doing business within their limits if the corporations themselves by the mere forms of the contracts taken in such business can over-ride and disregard such laws? Under the theory advanced by appellee no matter how many loans were made in Tennessee or what the extent of such loan business was it was all legal though against the express provisions of Tennessee law. Under this theory the Eastern Building &

Loan Association was to determine upon what terms it would do business in Tennessee and the state was powerless. We submit that this claim on behalf of appellee is utterly untenable. If it chose to do business in Tennessee as it says itself it was doing (Record p. 1) Tennessee law must govern. *Appellee could not theoretically be in and out of Tennessee at the same moment: in it to get benefits, and out of it to avoid obligations.*

Respectfully submitted,

HEBER J. MAY.
ROBERT M. HEATH.
W. C. McLEAN.

Attorneys for H. L. Bedford and Lou M. Bedford.

ADDENDA.

CHAPTER 81 of ACTS of 1895.

AN ACT to amend Sections 2, 3 and 4 of an Act passed March the 21st, 1891, being Chapter 122 of said Acts, and providing for the authentication of copies of charters to be filed with the Secretary of State, registering abstracts of same in the register's office in each county in which the company desires, or proposes to carry on business.

SECTION 1. *Be it enacted by the General Assembly of the State of Tennessee*, That Section 2 of an Act passed March the 21st, 1891, being Chapter 122 of said Acts, be so amended as to read as follows: That each and every corporation created or organized under, or by virtue of, any government other than that of the State, for any purpose whatever, desiring to own property, or carry on business in this State of any kind or character, shall first file, in the office of the Secretary of State, a copy of its charter. It shall be sufficient to authenticate such copies so filed by the certificate of the secretary, or secretaries, of such corporations, and by attaching thereto the corporate seal.

SEC. 2. *Be it further enacted*, That Section 3 of

said Act, passed March the 21st, 1891, be so amended as to read as follows: That it shall be unlawful for any foreign corporation to do business, or attempt to do business, in this State without first having complied with the provisions of this Act, and a violation of this statute shall subject the offender to a fine of not less than $100.00 nor more than $500.00, in the discretion of the jury trying the case.

SEC. 3. *Be it further enacted*, That Section 4 of said Act, passed March the 21st, 1891, be so amended as to read as follows: That when a corporation complies with the provisions of this Act, said corporation may then sue and be sued in the courts of this State, and shall be subject to the jurisdiction of this State as fully as if it were created under the laws of the State of Tennessee; *Provided*, that this Act shall not affect any contracts or remedy heretofore made by foreign corporations not having complied with the existing laws on the subject.

SEC. 4. *Be it further enacted*, That all laws and parts of laws in conflict with the provisions of this Act be and are hereby repealed.

SEC. 5. *Be it further enacted*, That this Act take

effect from and after its passage, the public welfare requiring it.

Passed April 27, 1895.

ERNEST PILLOW,
Speaker of the Senate.

JOHN A. TIPTON,
Speaker of the House of Representatives.

Approved April 30, 1895.

P. TURNEY,
Governor.

CHAPTER 114 of ACTS of 1895.

AN ACT to provide for the inspection of Building and Loan Associations doing business in the State of Tennessee.

SECTION 1. *Be it enacted by the General Assembly of the State of Tennessee*, That Chapter 2 of the Acts of 1891, passed March 26, 1891, and approved March 28, 1891, entitled "An act to regulate the business of ~~the~~ building and loan associations," and Chapter 114 of the Acts of 1893, entitled "An Act to amend Chapter 2 of the Acts of 1891," and passed March 26, 1891, and approved March 28, 1891, be, and the same are, hereby repealed.

SEC. 2. *Be it further enacted*, That the name,

"Building and Loan Association," as used in this Act, shall include all corporations, societies, organizations, or associations doing business in this State under a building and loan charter, or engaging in a building loan business.

Sec. 3. *Be it further enacted*, That on or before the first day of September, in each year, every building and loan association doing business in this State, and governed by this Act, shall file with the Treasurer of the State a detailed report of its affairs and operations for the year ending the thirtieth of June, immediately preceding, and such report shall be verified, under oath, by the president and secretary, or by three directors of the association, and shall contain answers to the following questions:

1. The date when the association was incorporated, and the par value of each share of stock.

2. Number of shares sold during the year.

3. Number of shares canceled or withdrawn during the year.

4. Number of shares in force at the end of the year.

5. A detailed statement of total receipts and disbursements, showing specifically what source received and to what source applied, inclusive of all items of expense.

6. A statement of the assets and liabilities at the end of the year. The following items shall constitute the assets of a building and loan association:

1. Money actually loaned.

2. Accrued interest, premium and fines on loans.

3. Dues in arrears not exceeding twelve months, provided not less than one monthly payment of dues has been made.

4. Furniture and fixtures.

5. Real estate.

6. Taxes and insurance advanced.

7. Solvent accounts.

8. Such other legitimate assets as the association may acquire in the course of its business.

9. Cash on hand as shown by books and official certificate of designated depositories.

7. File copies of its by-laws and published literature, which shall be free from ambiguity, and not misleading in its nature.

SEC. 4. Each association shall pay to the treasurer of the State ten ($10) dollars, on filing of each report; if an association shall willfully fail to furnish to the Treasurer of the State any report required by this Act, at the time so required, it shall, in the discretion of the State Treasurer, forfeit the sum of twenty-five ($25) dollars per day for every day such report shall be de-

layed or withheld, and the Treasurer of the State may maintain action in his name of office to recover such penalty, and the same shall be paid into the treasury of the State for the benefit of the State.

SEC. 5. That it shall be the duty of the State Treasurer, once in each year, or as often as he may deem necessary, at such times as he may select, to examine the books and verify the statement of each association governed by this Act, doing business under the laws of this State; and he shall make an annual report to the Governor, which shall be printed as other reports of the treasurer, giving a summary of the reports of all associations governed by this Act. The treasurer or examiners appointed by him shall have access to, and may compel the production of all books, papers, securities and moneys, of the association under examination. They shall have power to administer oaths, and examine under oath, the officers and agents of such association as to its affairs. And whenever it shall appear to the treasurer that any such association is impaired, he shall instruct the secretary to call a meeting of the stockholders and lay before them the result of his investigation. After passing upon the report of the treasurer the stockholders may contine in business if they so decide, but, in that event, there shall be no money paid to withdrawing stockholders, nor will

the association be allowed to issue stock, except a sufficient amount to loan the money as it accumulates, until said impairment is made good. And if it appears to the treasurer that the association is not conducting its business in accordance with its charter and by-laws, is being mismanaged, or that its funds have been misappriated, he shall take the same course as above; but in case the stockholders decide to continue business the association shall be given sixty days to correct its irregularities. And in case the said association fails to correct such irregularities in the conduct of its affairs, and to comply with the instructions of the State Treasurer in this regard, the said treasurer may, upon the advice of the attorney general, take such legal proceedings in the name of the State for the benefit of all the parties in interest as may be needful to wind up its affairs, and the court may, in its discretion, appoint a receiver to take charge of its assets; in case of such proceedings the said association shall pay all costs. The expenses and the attorney general's fees, for services, shall be allowed and paid out of the assets of the defaulting company.

SEC. 6. *Be it further enacted*, That all the officers of any building and loan association governed by this Act, and doing business in this State, who handle any of the funds of such association, shall give sufficient

bond for the faithful performance of his official duties as the board of directors may require, and no such officers shall be deemed qualified to enter upon the duties of his office until his bond is approved by the board of directors, and with whom such bond shall be filed; *Provided*, that the State Treasurer may require of any association, at any time, such increase of said bond or additional securities thereto as such increase of said insurance as he may deem necessary for the protection of members. The penalty for a failure of any association to file and maintain the bonds or policy, as required by the provisions of this section, shall be a fine of one hundred ($100.00) dollars for each day such association transacts business after such bond has become due under the provisions of this Act. Said bond or policy shall be held in trust for the benefit and protection of the members of such association, and shall be enforceable by any member whenever cause of action shall accrue. The fine herein provided for shall be recovered from the directors of such association.

SEC. 7. *Be it further enacted*, That all building and loan associations hereafter organized under the laws of the State shall confine their business to the county in which the main or principle office is located until such association has accumulated twenty-five thousand ($25,

000.00) dollars in building and loan or other securities, and such associations shall, before doing any business in any other county in this State, obtain from the State Treasurer a certificate showing that it has the amount of assets required by this section.

SEC. 8. Non-resident building and loan associations having not less than one hundred thousand ($100,000.00) dollars in assets, shall, before doing any business in this State, obtain a license from the State Treasurer, by complying with the following:

1. Such association shall file with the State Treasurer a certified copy of its charter, articles of incorporation, and by-laws, showing its mode of business.

2. File a detailed report of its actual financial condition, as provided for in Section 3 of this Act.

3. File a written instrument properly executed under the seal of the association, appointing the State Treasurer its agent, upon whom service of process may be had, stipulating and agreeing that any legal process, mesne or final, affecting such association, may issue against it from any county in the State, and when served upon the State Treasurer, in duplicate, shall have the same effect as personal service on said association. The State Treasurer shall, however, mail a copy of any papers served upon him, postage prepaid, to the home office of such association.

4. Pay the State Treasurer twenty-five ($25) dollars as fees for filing the papers mentioned in this section. For each license and annual renewal thereof the sum of ten ($10) dollars.

SEC. 9. It shall be the duty of the State Treasurer to examine the reports and papers of any such association applying for license to do business, and if he become satisfied that the applicant is solvent, and is being lawfully conducted he shall issue such association a license for a period of one year, and renew the same from time to time. The State Treasurer shall, whenever he may deem it necessary, examine into the affairs of any foreign association doing business in this State, and should he find, on examination, that such association is not conducting its business in accordance with the law, or that its affairs are in an unsound condition, or if such association refuses to permit examination to be made, or to pay the examination fee, he may cancel the authority of such association to do business in this State, and cause a notice thereof to be sent to the home office of the association, and to be published in at least one daily newspaper of this State once a week for four consecutive weeks. After publication of such notice, it shall be unlawful for any agent of said association to receive any further stock deposit from members resid-

ing in this State except payments on stock on which a loan has been made.

SEC. 10. *Be it further enacted*, That no officer, director or agent of any foreign building and loan association shall, in this State, solicit subscriptions to the stock of such association, or sell, or knowingly cause to be sold, or issued to a resident of this State any stock of an association while said association is not duly licensed, as herein provided License to agents to such companies or associations shall be issued by the Treasurer annually, on the first of January, and said Treasurer is authorized to collect from said associations a license fee of five ($5) for each traveling agent. Any violation hereof shall be deemed a misdemeanor, and, upon conviction, shall be punished by a fine of not less than ten (10) nor more than fifty (50) dollars; *Provided*, that the License issued by the State Treasurer to such associations as comply with this Act, by filing the certified copy of charter, by-laws, annual reports, and certificate making the State Treasurer their agent for the service of process, as herein required, shall give full and complete authority and power to enter into contract in this State, and no other requirement shall be made, except as provided in this Act.

SEC. 11. *Be it further enacted*, That the Treasurer of the State is hereby authorized and empowered to

employ agents or experts to examine said associations, who shall be subject to removal at any time by the State Treasurer. The examiner shall receive from the associations, for the purpose of meeting his expenses, and compensation, annual fees, as follows: *Provided*, non-resident associations shall not be required to pay such annual fees, except when their affairs are actually examined during the year, to-wit: Associations with assets of not exceeding $25,000, $25; associations with assets of more than $25,000 and not exceeding $100,000, $50; for each additional $100,000 of assets, or major part thereof, up to $1,000,000, $10; for each additional $100,000 of assets, or major part thereof, over $1,000,000, $5.

SEC. 12. *Be it further enacted*, That any and all parties violating any of the requirements of this Act, are hereby declared guilty of a misdemeanor, and shall be subject to a fine of twenty-five ($25) dollars per day for each day's violation thereof; and the Treasurer of the State may maintain action in his name for the recovery of said fine.

SEC. 13. *Be it further enacted*, That when, by the laws of any other State, territory or nation, any taxes, fines, penalties, licenses, fees, deposits of money, securities, or other obligations, or prohibitions are imposed

on building and loan associations of this State, doing business in such other State, territory or nation, or upon their agents therein, so long as such laws continue in force the same obligations, or prohibitions of whatsoever kind, shall be imposed upon all building and loan associations of such other State, territory or nation doing business in this State, and upon their agents here.

SEC. 14. *Be it further enacted*, That all non-resident associations that have heretofore complied with the Acts hereby repealed shall have ninety days from and after the passage of this Act to comply with the provisions of same; *Provided*, the State Treasurer may, in his discretion, extend the time, not to exceed six months, as to any particular association.

SEC. 15. *Be it further enacted*, That this Act take effect from and after its passage, the public welfare requiring it.

Passed April 27, 1895.

JOHN A. TIPTON,
Speaker of the House of Representatives.

ERNEST PILLOW,
Speaker of the Senate.

Approved May 6, 1895.

P. TURNEY,
Governor.

1846

No. 153.

Petition for Rehearing.

OFFICE SUPREME COURT of U. S.
RECEIVED
MAY 14 1901

Rec'd May 14, 1901.

IN THE

Supreme Court of the United States.

H. L. Bedford and Lou M. Bedford,

vs.

The Eastern Building and Loan Association of Syracuse, N. Y.

No. 153, October Term, 1900.

The Petition of H. L. Bedford and Lou M. Bedford.

ROBERT M. HEATH,
Attorney for H. L. Bedford and Lou M. Bedford.

IN THE

Supreme Court of the United States.

H. L. Bedford and Lou M. Bedford,

vs.

The Eastern Building and Loan Association of Syracuse, N. Y.

No. 153, October Term, 1900.

The Petition of H. L. Bedford and Lou M. Bedford.

To the Honorable the Justices of the Supreme Court of the United States:

H. L. Bedford and Lou M. Bedford, the appellants in this cause, respectfully present this their petition for a rehearing of this cause, and submit the following reasons why their prayer should be granted:

1. Among the questions involved in this cause was one as to the validity of certain contracts; the claim being

that The Eastern Building and Loan Association was doing business in Tennessee in 1891, not having complied with the terms of various laws of that State and that such contracts were therefore void. In the decision of the cause the Supreme Court of the United States in the opinion rendered by Mr. Justice McKenna referred to H. L. Bedford's written application for a loan as of date March 20th, 1891, and said, "the statutes of Tennessee relied on as a "defense was passed March 26, 1891, and to repeat the "question is, did the subscription to the stock of the asso-"ciation, its issuance and the application for a loan in pur-"suance of it constitute a contract which was inviolable by "the State Legislature? We think the answer should be "in the affirmative."

The Court in such opinion, referring to the right or privilege of a stockholder of the association borrowing, said: "The condition of a loan existing—means, in the "treasury, a tender of good security—the contingent right "became a vested one, a contract was formed, and can "there be a doubt that it was enforceable against the as-"sociation? If it could have been enforced by suit it was "properly yielded to without suit and possessed all legal "sanctions"

The ground of the opinion and decision rendered was that H. L Bedford elected to borrow on March 20th, 1891, and there then being "means in the treasury" and "a tender of good security" his privilege of borrowing was, at the date, March 20th, 1891, a vested right which could

not be impaired by the passage of the subsequent laws of March 26th, 1891.

Petitioners respectfully represent that in rendering its decision the Court overlooked the fact that the legislature of the State of Tennessee on March 10th, 1891, passed an Act which was approved March 17th, 1891, and which took effect from its passage. The Eastern Building & Loan Association had not complied with the terms of the Act just mentioned, which is chapter 95 of the Acts of 1891. Petitioners submit to the Court that at the time this Act, chapter 95, went into effect H. L. Bedford had no vested right, or fixed right of any kind to a loan of the Eastern Building & Loan Association, and that the effect of the Act, chapter 95, was to prohibit The Eastern Building & Loan Association from carrying on business in Tennessee and making loans to its citizens when the terms of that Act had not been complied with by it. Petitioners submit to the Court that H. L Bedford had no right to any loan of any kind until he elected to ask for it, and that he could not so elect after the passage of the Act, chapter 95, and thereby enable The Eastern Building & Loan Association to carry on business in Tennessee, and to make loans therein when the terms of that law had not been complied with.

In the 11th American and English Encyclopedia of Law (2nd edition), at page 120, it is said: "The right to prop-"erty acquired by an election dates from the election and "does not come into existence until the election is actually

"made. As a consequence it has been held that a con-
"veyance by quit claim before election did not convey a
"title subsequently acquired by election"

See also Hamilton vs. O'neil, 9 Mo. 11.
Welch vs. Anderson, 28 Mo. 298.
Branford vs. Wolf, 103 Mo. 391.
U. S. vs. Grundy, 2 Crauch 337.

In Allgeyer vs. Louisiana, 165 U. S. 587, it is said, "the 14th amendment, however, does not guarantee the "citizen the right to make, within his state, either direct-"ly or indirectly, a contract, the making whereof is con-"stitutionally forbidden by the State."

See also Hooper vs. California, 155 U. S. 656.

Petitioners submit that prior to an actual application for a loan, a stockholder's interest would be a mere possibility that a loan might be applied for at some time, and such a possibility, uncertain as to time and amount, and which might never arise, could not prevent the operation of such an act as chapter 95 of the Acts of 1891, hereinbefore mentioned.

See Clarke vs. McCrary, 12 S. & M. (Miss.) 347.
Price vs Sessions, 3 How. (U. S.) 635.
Allen vs. Hawks, 136 U S,, 301.
Randall vs. Kruger, 23 Wall, 148.
Stephens vs. Cherokee Nation 174 U. S , 478.
Taylor vs. Taylor, 12 Lea (Tenn.), 496.

Contingent remainders may be defeated by statute.

Peoples L. & E. Bank vs. Garlington, 32 S. E. Rep. (S. C), 513.

In Hamilton Gas Light Co. vs. Hamilton, 146 U. S., 268, the Court said, "Nor does every statute which affects "the value of a contract impair its obligation. It is one "of the contingencies to which the parties look now in "making a large class of contracts that they may be affect-"ed in many ways by State and National legislation."

A State law "may be retrospective in its character "and may divest vested rights and yet not violate the "Constitution of the United States unless it also impairs "the obligation of a contract."

Charles River Bridge vs. Warren Bridge, 11 Peters, 539.

Satterlee vs. Matthewson, 2 Peters, 413.

Laws often rerder performance of contracts illegal which were legal when made and prevent performance thereof.

Odlin vs. Ins. Co , 2 Wash., C. C., 312.

Rogers vs. Hoyt, 4 Vt., 172.

Fitzgerald vs. R. R., 13 L. R. A., 70 (Vt.).

Bradford vs. Jenkins, 41 Miss., 336.

Dermott vs. Jones, 2 Wall, 7.

Saunner vs. Ins. Co. 41 Mo. App., 480

Brick & Church vs. City, 5 Cowen, 538.

Hamilton vs, City of Hamilton, 146 U. S., 258.

This principle applies more strongly, of course, when no attempt had been made to form the contract until after the passage of the law.

The decision in the present case was based on the idea that H. L. Bedford could have forced the Eastern Building and Loan Association, by suit, to have made him a loan, and that the Association simply yielded to what it could have been forced to do. Petitioners submit that H. L. Bedford never having applied for any loan prior to the passage of the Act, chapter 95, before mentioned, had no right which he could have asserted against the Association. After the passage of such act he and the other Tennessee stockholders in such Association, who had not previously applied for loans, could not as citizens and residents of Tennessee by applying therefor enable such Association to carry on business in Tennessee, when it had not complied with the terms of the Tennessee laws. Upon such applications being made after the passage of such laws, the Association had the right and power to refuse the same, and should have done so or complied with the State laws.

It cannot be doubted that the Eastern Building and Loan Association was doing bnsiness in Tennessee at the time of the transactions in question. It said so itself in its bill (Transcript, p. 1), and had its agents and agencies therein. It is submitted that such Association, when the Act, chapter 95, fixed the terms upon which such

business could be carried on, could not disregard such Act and carry on its loan business thereafter in Tennessee. When Tennessee stockholders had not previously asked for loans they could not by asking therefor after such Act enable the Association to disregard the law.

The Association was carrying on business in Tennessee, although it only loaned to old stockholders and may not have sold stock after the passage of such laws.

Connecticut, &c., Ins. Co. vs. Spratly. 172 U. S. 602.

See also the Tennessee cases cited in original brief on behalf of Bedford and wife, at pages 41, 42, 43 and 44 thereof.

Petitioners, H L. Bedford and wife, in their answer relied, as a defence, upon the following acts of the legislatue of the State of Tennessee, viz:

Chapter 31 of 1877, passed March 19, 1877 and approved March 21, 1877. Chapter 95 of 1891, passed March 10, 1891 and approved March 17, 1891. Chapter 122 of 1891, passed March 21 1891 and approved March 26, 1891. and Chapter 2 of 1891, passed March 26, 1891 and approved March 28, 1991. All of these Acts are copied in the appendix to the original brief on behalf of Bedford and wife. Bedford and wife also relied upon all of these Acts in the assignments of error filed in the United States Circuit Court of Appeals. See Transcript pages 14, 15, (17, 18,19,) 116, 117.

The original brief filed on behalf of Bedford and wife in the Supreme Court of the United States in the assignments of error therein (page 15) also relied on all the Acts of Tennessee hereinbefore mentioned.

The Act, Chapter 31 of 1877, by Section 2 thereof, provided that foreign corporations affected thereby "desiring to carry on its business in the State must first file "in the office of the Secretary of State a copy of its charter" and "cause an abstract of the same to be recorded in "the office of the register of each county in which such "corporation proposes to carry on its business or to acquire any land "

Section 7 of this Act, Chapter 31 of 1877, provides all charters so to be filed as to "such parts thereof as may be "found to be in conflict with the laws of the State shall "be null and void."

The Act, chapter 95, of 1891, took effect from its passage, and extended the Act, chapter 31, of 1877, to foreign Building and Loan Associations. The Act, chapter 122, of 1891, extended the Act, chapter 31, of 1877, to all foreign Corporations. Under each of these Acts, chapter 31, of 1877, chapter 95, of 1891, and chapter 122, of 1891, the Eastern Building and Loan Association was obliged to file its charter with the Secretary of State and to register abstracts thereof in the different counties. Such charter was not filed with the Secretary of State until August 11, 1893, and no registration was had until August 15, 1893.

The Supreme Court of Tennessee, as shown in the brief filed on behalf of Bedford and wife upon the hearing of this cause in Supreme Court of United States, has repeatedly held that when the charters of foreign corporations were not filed with the Secretary of State and abstracts thereof registered in the different counties in Tennessee where business was carried on, that contracts were absolutely void.

See authorities referred to in that brief, at pages 39 to 44.

See especially, Myers Mfg. Co. vs. Wetzel, 35 S. W. Rep. 896.

Cumberland Co. vs. Canter, 35 S. W. Rep. 888.

N. H. Ins. Co. vs Kennedy, 36 S. W. Rep. 710 (96 Tenn. 711).

Lumber Co. vs. Thomas, 92 Tenn. 595.

The said brief, at the same pages referred to cases decided by the Supreme Court of Tennessee long prior to statutes in question, which plainly indicated what the construction of such statutes would be by the Tennessee Supreme Court. These decisions began as far back as 1843 and numbers of them were made before The Eastern Building and Loan Association transacted any business of any kind in Tennessee. The said brief, on page 40, further referred to authorities showing that the filing of the charter with the Secretary of State and registration of abstract thereof in 1893, did not validate the illegel contracts made in 1891.

The Act, chapter 95, of 1891 imposed the same terms upon foreign corporations as the Act, chapter 122, of 1891 did, and it was just as necessary to comply with the terms under one Act as under the other.

In the additional brief filed in the Supreme Court of the United States on behalf of Bedford and wife on the hearing the attention of the Court was called to the case of Young vs. S. T. I. Co. 85 Tennessee, Reports 198, decided by the Tennessee Supreme Court in 1886. This decision construed the Act, chapter 31, of 1877 of Tennessee requiring charters of foreign corporations to be filed with the Secretary of State and abstract thereof to be registered. The Supreme Court of Tennessee in such case (85 Tenn., 198) held that foreign corporations could not carry on business in Tennessee "except upon compliance with this "Act and upon the terms of this Act." This decision, made in 1886, of course applied to the Act, chapter 95, of 1891 as soon as passed, or such Act was simply an extention of chapter 31 of 1877. When the Act, chapter 95, of 1891 went into effect, it is submitted, no contract of any kind existed between Bedford and the association as to a loan, as he had made no application for any, and might never have done so. Bedford could not have forced the association to continue business in Tennessee after the passage of the Act, Chapter 95 of 1891. It did so voluntarily without complying with the law. It kept up its agencies in Tennessee and made loans through such agencies and declined to make them except in that manner.

(See original brief for Bedford on the hearing, pages 6, 7,8.) If the stockholders in Tennessee had any privilege of borrowing after the passage of the Tennessee law, such privileges could only have been claimed in New York, the situs of the Eastern Building & Loan Association, and not in Tennessee and as part of aud in connection with the forbidden business in Tennessee. The association should have left the State of Tennessee, remained at home, discharged its agents in Tennessee and ceased business in Tennessee or complied with the Tennessee law. Stockholders in Tennessee should have been compelled to go to the association in New York if they desired to borrow. After the passage of the law the association had no right to go to or remain in Tennessee and to make the contingent right of the Tennesse stockholders a pretext for carrying on the illegal business of loaning money in Tennessee.

It appeared distinctly that the Eastern Building and Loan Association after the passage of the Tennessee laws of 1891, carried on its loan business in Tennessee exactly as it had previously done, and that the loan to Bedford was a part of their general illegal business and not an isolated transaction. Petitioners submit that even if the State of Tennessee could not by the Act of March 26, 1891, require the Eastern Building and Loan Association to deposit securities before making loans to stockholders who had previously applied therefor, that the Act, chapter 95, of 1891, prevented such loans to stockholders who

applied thereafter, when the terms of such Act had not been complied with.

2. In the opinion rendered the Supreme Court of the United States comments upon the case of New York, &c., Building and Loan Association vs. Cannon, 99 Tennessee, 344, and differs from the conclusion arrived at therein by the Supreme Court of Tennessee. It is respectfully submitted that the Supreme Court of Tennessee did not in the Cannon case decide that a stockholder had a vested right to a loan. Such Court merely held that if such stockholder did have such vested right that the Building and Loan Association was still obliged to comply with the State law, before carrying on business. The Supreme Court of Tennessee has never held that a stockholder in a Building and Loan Association had any vested right to a loan from such Association.

See N. Y. &c. B. & L. Association vs. Cannon, 99 Tennessee, 344;

Illinois Building and Loan Association vs. Walker, 42 S. W. Rep., 192;

U. S. Savings and Loan Co. vs. Miller, 47 S.W. Rep., 17.

The Supreme Court of Tennessee has simply held that the stockholder had "only the privilege of applying for a "loan to the amount stated therein, if he should see proper "to do so. That provision did not obligate the company "absolutely to loan the money, but was expressly con- "ditioned upon the fact of there being a sufficient amount

"of money in the treasury, and also upon proper applica-
"tion being made, accompanied with proper security with
the right of the company to pass upon these matters."
(See 42 S. W., Rep. 193.) In that case the Court held the
application for loan was but "the beginning of the nego-
"tiation for that purpose," and further said: "By becom-
"ing a stockholder the defendant, B. F. Walker, had
"merely acquired a status that would enable him to open
"negotiations for a loan. There was no contract between
"him and the company at that time which could be in any
"wise impaired by subsequent regulations prescribed by
"the legislature for the conduct of the company's
"business. We are therefore of the opinion that
"the complainant can base no rights as against
"the statutes upon the stock subscription above
"referred to or by reason of the fact that Walker
"had become a stockholder" Petitioners submit that the facts in the present case are similar to those in the case just cited—that the Eastern Building & Loan Association had absolute power to decline to make any loan and to refuse any security offered and that they could not have been forced to make a loan or to accept security offered therefor. It is respectfully submitted that the Supreme Court of Tennessee did not decide in the Cannon case that a stockholder had a vested right to a loan, but intimated the contrary, holding that even if there had been a vested right the law should have been complied with. It is further submitted that in the present case Bedford had no

fixed or vested right to a loan at any time and certainly prior to his asking for one, March 20, 1891, and that the Supreme Court of the United States in the opinion rendered herein merely differed from the Tennessee Supreme Court in holding that where a vested right to a loan existed such right was impaired by the subsequent State legislation.

3. As hereinbefore set out petititioners ask a rehearing of this cause because the Act, Chapter 95 of 1891 of Tennessee was overlooked by the Court in its opinion and when such act is considered petitioners submit that the result would be different from the conclusion arrived at in such opinion.

Petitioners further ask for a general rehearing of the legal questions involved in this cause. Petitioners do not suppose that the Supreme Court of the United States in its opinion herein meant to hold that the mere fact that a person held stock in the Eastern Building & Loan Association gave him a fixed and vested right to a loan from such association and that such right was impaired by the passage of laws by the Legislature of Tennessee before any attempt to secure such loan was made. If the Court meant to be understood as so holding, then petitioners respectfully ask a rehearing upon the question. It is not a question that involves simply personal rights of petitioners. It is a question that involves the right of the State of Tennessee to fix the terms upon which foreign Building & Loan Associations can do business in Tennessee.

Petitioners respectfully submit that the State had the power to fix the terms upon which the foreign Building & Loan Association could do business in Tennessee, and that such power existed as fully after stock had been sold in Tennessee as before. By selling stock in Tennessee such Association could not acquire the power or right to thereafter transact business in Tennessee and loan money therein, when they had not complied with the laws of the State fixing the terms upon which such business could be so carried on.

Petitioners respectfully submit, as shown fully by the record herein, and by the brief filed on their behalf on the hearing herein, that the Eastern Building and Loan Association, after the passage of the Tennessee laws of 1891, carried on a general loan business in Tennessee without having complied with such laws and that the transaction in question was part of this illegal business.

Petitioners submit that the effect of the decision rendered herein is to hold that the State of Tennessee, after stock had been sold by the Eastern Building and Loan Association in Tennessee, could pass no laws fixing the terms upon which such Association could carry on business in Tennessee and loan money therein.

Petitioners respectfully ask a rehearing upon the point that the selling of stock in Tennessee did not prevent the State from passing the subsequent laws of 1891, being chapters 95, 122 and 2, of that year, and that where

such laws were not complied with, loans made in Tennessee by the Eastern Building and Loan Association were illegal. Petitioners submit that after the passage of such laws the right to make such loans was dependent entirely thereon, and that nothing done by the Association or by the stockholders therein could authorize such loan, where the laws before referred to had been disregarded.

In considering the various questions hereinbefore mentioned and each of them, petitioners call the attention of the Court to the fact that while the application for a loan by H. L. Bedford bears date March 20, 1891, that the same did not leave Tennessee until after May 5, 1891. At that date the appraisers valued the property offered as security for any proposed loan.

Petitioners therefor submit that while the application for a loan bore date March 20th, 1891, that such application cannot be considered as having been made earlier than May 5th, 1891. The application was not in fact received by The Eastern Building & Loan Association until May 12, 1891. See Transcript, pages 63-66-67, and original brief filed on behalf of Bedford and wife upon the hearing at pages 2-6.

When the application was received by the association each and all of the Acts of Tennessee of 1891 had been passed and were in force. Such Acts as petitioners submit not having been complied with by The Eastern Building & Loan Association prevented such association from

doing business in Tennessee and loaning money therein as a part of such business.

Petitioners therefore respectfully pray that an order may be made for a rehearing of the argument in this case on a day to be appointed by the Court at such time and upon such points as the Court may direct.

ROBERT M. HEATH,

Attorney for H. L. Bedford and Lou M. Bedford.

I hereby certify that this petition for a rehearing is presented in good faith, and that I believe it is based on meritorious grounds.

ROBERT M. HEATH,

Attorney for H. L. Bedford and Lou M. Bedford.

18479

EVENING POST JOB PRINTING HOUSE, NEW YORK.

No. XXXX 153
Brief of Russell
Filed Dec. 18, 1899.

Office Supreme Court U. S.
FILED
DEC 18 1899
JAMES H. MCKENNEY
Clerk

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1899.

H. M. BEDFORD and LOU M. BEDFORD, his wife,
Appellants,

AGAINST

EASTERN BUILDING AND LOAN ASSOCIATION OF SYRACUSE, New York,
Appellee.

Certified from the United States Circuit Court of Appeals for the Sixth Circuit.

IN THE MATTER OF THE PETITION OF BEDFORD *et al.* FOR A WRIT OF *certiorari* TO REQUIRE THE CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT TO CERTIFY TO THE SUPREME COURT OF THE UNITED STATES THE WHOLE RECORD IN THE ABOVE ENTITLED CAUSE FOR ITS REVIEW AND DETERMINATION.

BRIEF IN BEHALF OF EASTERN BUILDING & LOAN ASSOCIATION IN OPPOSITION TO THE MOTION.

I.

This case is certified by the Judges of the Circuit Court of Appeals for the Sixth Circuit under § 6 of the Act of March 3, 1891 (26 Stat., 826).

II.

There are four distinct questions of law, very carefully and accurately framed, certified to the Supreme Court for its determination. Those questions are as follows:

"*First Question:* Was the validity of the notes signed in Tennessee by the maker, manually delivered by him to the soliciting agent of the association at Memphis to be transmitted to the association at that place and payable at Syracuse, to be determined by the laws of Tennessee or of New York?

"*Second Question:* Was the validity of the mortgage executed and delivered under the same circumstances to be determined by the validity of the note to which its was incident,or by the law of the State where the land lay which the mortgage conveyed and which upon default must be sold to pay the notes?

"*Third Question:* May a State by its laws forbid the transaction of business within its borders, annul the contracts of its citizens entered into and to be performed without the State, when those contracts are but the consummation of the inhibited business within the State without an infraction of the Fourteenth Amendment to the Constitution of the United States?

"*Fourth Question:* Even if a State by law refuse enforcement of such a contract in its courts, should a Circuit Court of the United States sitting in the State refuse to enforce it when jurisdiction over the parties exists by reason of their diverse citizenship?"

III.

These questions are preceded by such a statement of the *ultimate*, as distinguished from the *evidential* facts, as the Judges of the Circuit Court of Appeals deem established, and consider necessary to enable this Court to clearly apprehend the state of facts out of which the questions certified arise. The statement of facts is adequate under the rules and settled practice of this Court in such cases.

Rule 37, § 1.
Sigafus *v.* Porter, 85 Fed. Rep., 689.
Jewell *v.* Knight, 123 U. S., 426.
Cross *v.* Evans, 167 U. S., 60.
Texas & Pac. R. Co. *v.* Anderson, 149 U. S., 237.
White *v.* Ewing, 159 U. S., 36.
White *v.* Ewing, 66 Fed. Rep., 2.

IV.

In effect, the motion and petition now submitted in behalf of the appellants, is an attempt to get this Court, upon a certified case from the Circuit Court of Appeals, to review the case upon the facts and the evidence, notwithstanding the settlement of the facts by the determination of the case in the Courts below.

See—

Stuart *v.* Hayden, 169 U. S., 1, 14.
Dravo *v.* Fabel, 132 U. S., 487, 490.
Compania de Navigacion la Flecha *v.* Brauer, 168 U. S., 104, 123.
Eastern Building & Loan Asso. *v.* Bedford, 88 Fed. Rep., 7.

V.

It is not the purpose of the certification clause in the act of 1891 to make it necessary for this Court to pass upon the whole case, both as to the facts and the law, and if the Circuit Courts of Appeal cannot themselves so certify a case to this Court as to accomplish this end, certainly the parties litigant should not be allowed to defeat the very purpose of the clause in question by invoking the writ of *certiorari* to bring up the entire record, when the statement of the case certified is clear and amply sufficient to elucidate the questions submitted by the Circuit Court of Appeals.

Columbus Watch Co. *v.* Robbins, 148 U. S., 266.

Graver *v.* Evans, 167 U. S., 60.

United States *v.* Union Pac. Ry. Co., 168 U. S., 505, 512.

McHenry *v.* Alford, 168 U. S. 651, 658.

Fire Ins. Co. *v.* Wickham, 128 U. S., 426, 432.

VI.

It is true that under § 2 of Rule 37, it seems to be permissible for either party to a case certified from a Circuit Court of Appeals to make application "to this Court that the whole record and cause may be sent up to it for its consideration."

Rule 37, § 2.

But it is not the purpose of this provision of Rule 37 to make it incumbent on this Court to review a controversy as to the bearing and weight of the evi-

dential facts shown by the record in the Court below.

United States *v.* Perrin, 131 U. S., 55, 58.
Fire Ins. Co. *v.* Wickham, 128 U. S., 426, 482.

"It is the fundamental facts that are to be stated, not the evidential facts from which the fundamental facts are found."

Sigafus *v.* Porter, 85 Fed. Rep., 689, 690; Rule 37, § 1.

VII.

The "statement of facts" called for by the Rule is in effect such a statement of the ultimate or operative facts as is required in a complaint under the rules of code pleading, to the exclusion of the mere evidential facts.

Phillips on Code Pleading, §§ 185-187.
Bliss on Code Pleading (2d Ed.), § 206.

By the motion and petition of appellants, this Court is asked to examine the record in the Court below for the purpose of ascertaining the *evidential* facts, and to have that record brought up in order that this Court may determine all the issues in the case. It is not claimed that the Circuit Court of Appeals for the Sixth Circuit has incorrectly certified the facts, but that it has not certified *all* the facts. This Court will scarcely countenance a practice that, once adopted, will lead to similar applications to the one at bar in every case that may be certified, and upon which the Circuit Courts of Appeal shall request the determination of this Court, not upon questions of the *probative* effect of the evidence, but upon grave questions of law, such as those shown by the certi-

ficate in this case. The facts stated in the certificate are ample to inform this Court as to the controversy out of which the questions certified arise, and therefore the statement is sufficient and the motion should be denied.

VIII.

This case is not one in which an appeal or a writ of error would lie, under the act of Congress. It could only reach this Court by such a certification as has been made. Therefore it cannot be removed to this Court for the determination of the whole controversy by this indirect method. If the facts stated by the Judges in connection with the questions certified are sufficient to show the relevancy of the questions to the matters in controversy, it is not necessary for this Court to go further into the facts of the case.

IX.

Even admitting that the granting of this motion would establish the point for which appellants seem to desire it, namely, that the *execution and delivery* of the contracts between the parties took place in Tennessee, would that help their case? If not, the granting of the motion would serve no useful purpose. For example, in a recent case before the Circuit Court of Appeals for the Fifth Circuit, the notes and trust deed were *signed, acknowledged and delivered* (to the lender) in Tennessee; were payable in New York; the makers were residents and citizens of Tennessee, and the lenders of New York; yet in order to save the contract and enforce it as written, the Court held that the contract was made *in Mississippi*, merely because of an oral un-

derstanding arrived at in that State. The case cited is peculiarly strong, because the effort of complainants was merely to reduce the rate of interest from ten to six per cent., and the Mississippi statute provided that not more than six per cent. should be charged, unless there was an agreement *in writing* for more.

Glover *v.* Equitable Mortgage Co., 87 Fed. Rep., 518.

It seems manifest that the entire object of this motion is to have this Court review a question of fact. The Circuit Judge held that these contracts were made and entered into in New York.

Record, page 133.

That the Circuit Court of Appeals reached the same conclusion appears from the premises to the first and third questions certified. For the purpose of reviewing these findings of fact in the courts below it cannot be expected that this Court, in a case certified from a Circuit Court of Appeals, will direct the entire record to be brought up for its consideration.

X.

Appellants claim that the allowance of this motion will develop an admission by appellee that it was "doing business" in Tennessee. The actual admission is that "it was lawfully doing business in Tennessee" at the "times hereinafter named." This cannot help appellants' case. The Tennessee Supreme Court has several times held that each contract of a non-complying foreign corporation must stand alone; the fact that it may have been daily making unlawful contracts is of no importance in determining the validity of any particular contract.

Norton *v.* Trust Co. (Tenn.), 46 S. W. Rep., 544.

In the case just cited, two otherwise unreported decisions of the Supreme Court of Tennessee are reviewed at length upon this question.

XI.

A contract to pay money, borrowed of a building and loan association of a foreign State is one to be performed in such State when the borrower has his option to send such payments to the association in such State, or make them at a local office, so long as the association sees fit to maintain it with the understanding that the local agents are his agents.

Pollock *v.* Carolina B. & L. Asso. (So. Car.), 29 S. E. Rep., 77.

Under facts practically identical with those in the case at bar, the Supreme Court of Alabama holds the contract to have been *made* in the State of the corporate *situs* of the building and loan association.

Falls *v.* Building & Loan Asso., 97 Ala., 417; 13 So. Rep., 31.

A contract, although in violation of the laws of a given State, if not made in that State, and if valid where made, may be *enforced* in the courts of the State where, if made, it would have been invalid.

Zeltner *v.* Irving, 25 App. Div. (N. Y.), 228.

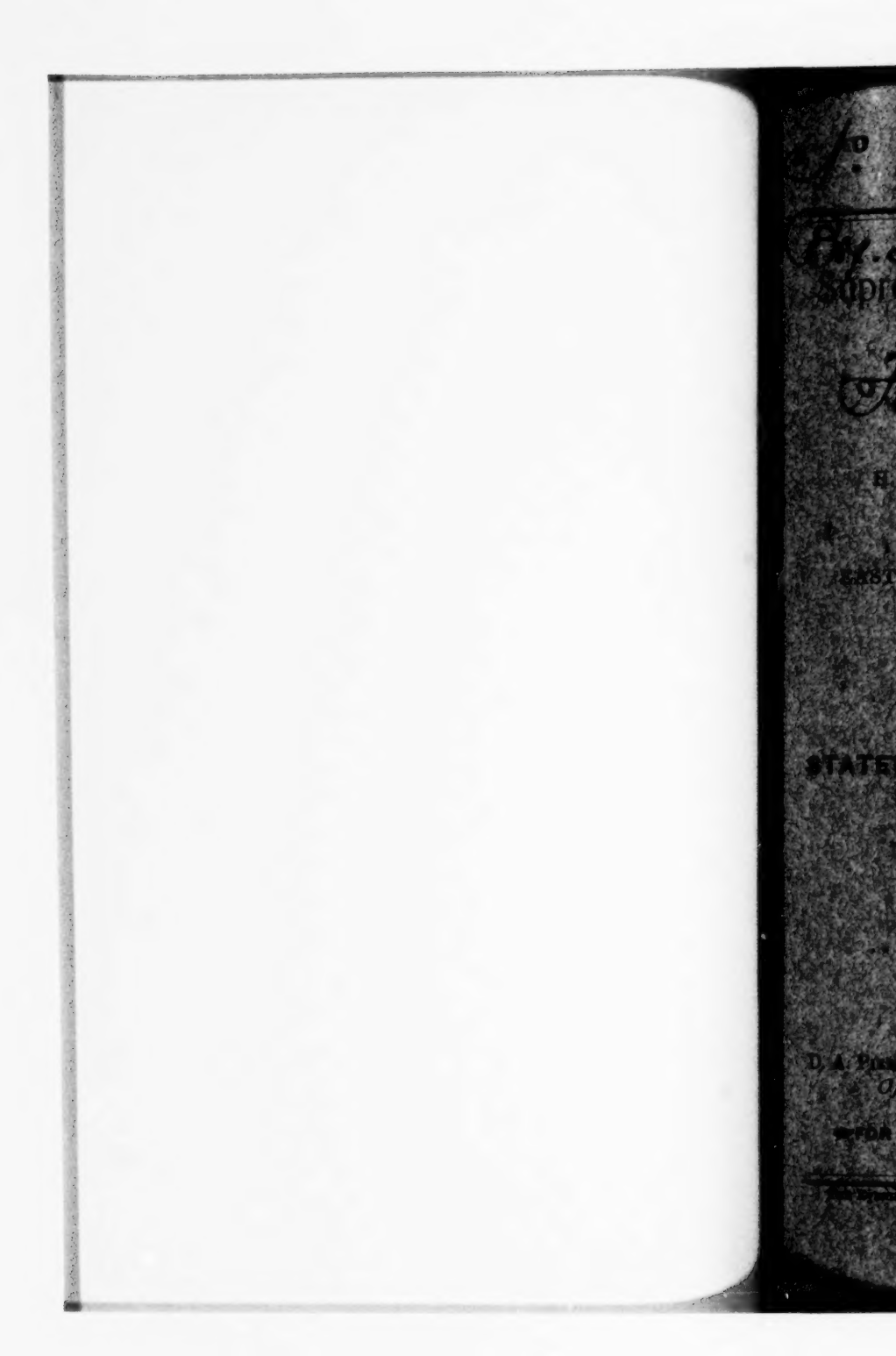
XII.

The motion under consideration is not accompanied by a certified copy of the record in the Circuit Court of Appeals, as required by Rule 37, § 2.

We have stipulated, as a matter of courtesy to opposing counsel, that a copy of the transcript from the Circuit Court to the Circuit Court of Appeals may be used in lieu of such certified record of the Circuit Court of Appeals, provided this be regarded by this court as a sufficient compliance with the rule in question. To us, however, it seems a question of grave doubt, which we reserved in making the stipulation, whether counsel can thus stipulate away a rule of Court the manifest purpose of which is to place this Court, at the very threshold of inquiry, in possession, not of the transcript from the Circuit Court, but of a complete copy of the record from the Circuit Court of Appeals, covering the case certified, and all orders entered in the progress of the case by the Circuit Court of Appeals itself. For the failure to comply with this requirement of the rule, we think that this motion must be denied, although, if the Court be satisfied with the transcript, concerning which the stipulation is made, we have no objection to the motion being determined on its merits upon the transcript mentioned. Upon the merits, however, for the reasons stated, and upon the authorities cited, we ask that appellants' motion be denied.

WM. HEPBURN RUSSELL,
WM. BEVERLY WINSLOW,
J. W. BUCHANAN,
H. DENT MINOR,
Counsel for Appellee.

BUCHANAN & MINOR,
Memphis, Tennessee.
RUSSELL & WINSLOW,
New York City,
Solicitors for Appellee.



Supreme Court of the United States,

OCTOBER TERM, 1900.

No. 153.

H. L. BEDFORD and LOU M. BEDFORD, his wife,
Appellants-Petitioners,

v.

EASTERN BUILDING AND LOAN ASSOCIATION OF SYRACUSE, N. Y.,
Appellee.

(17,558.)

STATEMENT, BRIEF AND ARGUMENT FOR THE EASTERN BUILDING AND LOAN ASSOCIATION, APPELLEE.

Statement of the Case.

This is a suit in equity, which originated in the United States Circuit Court for the Western Division of the Western District of Tennessee, and in which the Eastern Building and Loan Association, appellee, as complainant, filed its bill against the appellants to recover from H. L. Bedford an indebtedness incurred under certain obligations which he had assumed as a stockholder in the Eastern Building and Loan Association, and to foreclose a mortgage upon certain real estate in the State of Tennes-

4 see, such mortgage having been executed by the appellants for the purpose of securing compliance with the obligations to the Eastern Building and Loan Association of H. L. Bedford as an "advanced" or borrowing member of the corporation.

From a decree of the United States Circuit Court in favor of the complainant in said bill an appeal was prosecuted by the appellants to the Circuit Court of Appeals for the Sixth Circuit. On the hearing of this appeal the Circuit Court of Appeals rendered no decree but certified the case to this Court under § 6, Clause 1 of the Act of March 3, 1891 (26 U. S. Statutes, 828, § 6, Cl. 1).

After the case had thus reached this Court, ap-
5 pellants petitioned for a writ of *certiorari* to have the entire record certified to this Court, which petition was granted, and, consequently, the complete record in the cause is now before this Court, which is called upon to "decide the whole matter in controversy in the same manner as if it had been brought" here "for review by writ of error or appeal."

Questions Certified.

The most important controversies presented by the record, and which this Court will be required to finally decide, are so admirably set forth in the questions certified and submitted for answer by the Cir-
6 cuit Court of Appeals for the Sixth Circuit that we restate them here. They are as follows:

"*First Question:* Was the validity of the notes signed in Tennessee by the maker, manually delivered by him to the soliciting agent of the association at Memphis to be transmitted to the association at Syracuse for the acceptance of the association at that place and payable at Syracuse, to be determined by the laws of Tennessee or of New York?

"*Second Question:* Was the validity of the mortgage executed and delivered under the same circum-

stances to be determined by the validity of the notes to which it was incident, or by the law of the State where the land lay which the mortgage conveyed and which upon default must be sold to pay the notes? 7

"*Third Question:* May a State by its laws forbidding the transaction of business within its borders annul the contracts of its citizens entered into and to be performed without the State, when those contracts are but the consummation of the inhibited business within the State, without an infraction of the Fourteenth Amendment to the Constitution of the United States? 8

"*Fourth Question:* Even if a State may by law refuse enforcement of such a contract in its Courts, should a Circuit Court of the United States sitting in the State refuse to enforce it when jurisdiction over the parties exists by reason of their diverse citizenship?" (Transcript, p. 133.)

Facts Certified.

The Judges of the Circuit Court of Appeals for the Sixth Circuit, in certifying the foregoing questions for answer, preceded the same by a statement of the facts shown by the record in the case in so far as they were deemed material to enable this Court to determine the questions of law so submitted. The statement of the case thus made by the Judges of the Circuit Court of Appeals so well presents the facts shown by the record at the same time setting forth the statutory provisions of Tennessee, out of which the controversies in this case arise, that we deem it proper to embrace in our statement of the case the facts as reported in that certificate to this Court. They are as follows: 9

"Before Taft and Lurton, circuit judges, and Thompson, district judge.

The Eastern Building and Loan Association of Syracuse, N. Y., is a corporation organized under the laws of the State of New York for the purpose and with the power of conducting a general building association business in New York and other States. Its plan of organization is similar to that generally adopted by such associations. Subscribers to its stock pay $1 initiation fee for each share of $100 and 75 cents per month as dues on each share and certain fines on default, and when the whole amount of dues and dividends paid in amount to $100, the holder is entitled to withdraw the same. Borrowing
11 members receive par value of their shares in advance and secure their compliance with requirements as to dues, fines and interest by mortgage or otherwise.

Prior to March 26, 1891, the association had a soliciting agent in Memphis, Tennessee, whose duty it was to solicit persons to become members of the association and to subscribe to its stock. The agent had no authority to accept applications for membership or subscriptions for stock but only the authority to transmit them by mail to the office of the company in Syracuse, New York, where they were accepted or rejected by the board of directors of the association. Three months after a person had subscribed for stock, and the stock had been issued to him, he
12 was, by the by-laws of the association, permitted to apply for an advance of the nominal par value of his shares or, in effect, a loan. This application was forwarded through the soliciting agent to the company at Syracuse together with the certificate of stock, already issued, as a pledge and a statement of the value of the property which it was proposed to mortgage to secure the loan. The application was accompanied by a recommendation of what was called "the local board" in regard to the wisdom of the loan. The local board consisted of certain stockholders of the association living at the applicant's

place of residence who had been elected by all the 13
resident stockholders, and whose duty it was to advise the association at Syracuse concerning the value of the property offered and the character of the applicant. The local board had officers, one of whom was a treasurer through whom members might, if they desired, forward payments due to the association at Syracuse, but the by-laws stated that in so doing the local treasurer was acting as agent for the stockholders and not for the association. Another by-law provided that all payments should be made to the secretary of the association at the home office in registered letter, express or money order or drafts.

On the second day of January, A. D. 1891, H. L. 14
Bedford, a resident and citizen of Shelby county, Tennessee, made the following application to the association which he delivered to its soliciting agent at Memphis to be forwarded to Syracuse:

O K. Sup't.	Cashier.	Stock.	A. F. 1, 26, '91. Recorded.	Indexed.	Filed.	Mailed.

46 shares. Number 4773.

Application for Shares in the Eastern Building and Loan Association of Syracuse, N. Y.

Agent, J. H. T. Martin. 15

I, H. L. Bedford, of Bailey, county of Shelby, State of Tennessee, No. of street or P. O. box —; occupation, farmer; hereby apply for membership in the Eastern Building and Loan Association of Syracuse, Onondaga county, New York, and subscribe for 46 shares of installment stock.

I hereby agree to abide by all the terms, conditions and by-laws contained or referred to in the certificate of shares, and will also comply with all the rules and regulations of said association, and do also hereby, in order to facilitate the transaction of business of the Eastern Building and Loan Associa-

16 tion of Syracuse, N. Y., make, constitute and appoint the secretary of said association for me, in my name, place and stead, to appear and vote as my proxy upon any and all shares of stock at any time held by me, or standing in my name in said association during my absence, at any and all meetings of stockholders or directors and upon any and all matters which may properly come before any such meetings and attorneys, one or more under him, from time to time in writing to appoint, hereby authorizing, ratifying and confirming all that any said attorney, or his substitute, may do, or cause to be done as such proxy by virtue hereof. This proxy is not in any manner to affect my right to vote on
17 all such stock whenever I am personally present at any stockholders' meeting.

In witness whereof I have hereunto set my hand and affixed my seal this 2d day of Jan'y, A. D. 1891.

Signature of applicant,

H. L. BEDFORD. [SEAL.]

H. B. MARTIN, *Witness.*

The price of stock must accompany this application.

Endorsed.

Instructions to Agents.

This application should always be written in ink.
18 All blank places should be filled correctly and plain to avoid any chance of error in the home office. Be particularly careful to have the name of applicant written plain and spelled correctly, and where there appears any possible chance for misreading any word. Agents should use the space at the bottom of application for explanation. The admission fee must accompany the application before the stock can be written at the home office.

Send certificate of shares to:

Name, —— ——.

P. O., ——.

County, ——; State, ——.

On the 2d of February, 1891, the certificate of stock was issued by the association and sent to its soliciting agent at Memphis, who, a few days later, handed it to Bedford. The certificate was in the words following:

Series No. B 2. Maturing August 1st, 1897. Eastern Building and Loan Association of Syracuse, N. Y.

Certificate number 4773; number of shares, 46; amount, $4,600.

This certifies that H. L. Bedford, of Bailey, county of Shelby and State of Tennessee, is hereby constituted a shareholder of the Eastern Building and Loan Association of Syracuse, New York, incorporated under the laws of the State of New York, and holds forty-six shares therein of one hundred dollars each, and in consideration of the membership fee, together with agreement and statements contained in the application for membership in the association, and full compliance with the terms, conditions and by-laws printed on the front and back of this certificate, which are hereby referred to and made a part of this contract, and the said Eastern Building and Loan Association of Syracuse, New York, agree to pay said shareholder or his heirs, executors, administrators or assigns the sum of one hundred dollars for each of said shares at the end of seventy-eight months from the date hereof or in case of his death prior to the expiration of seventy-eight months, the association will pay the sum of all monthly installments paid on this certificate with interest at 6 per cent. per annum, payable in the manner and upon the conditions set forth in said terms, conditions and by-laws hereto attached. All payments under this certificate are payable at home office of the association at Syracuse, New York, within sixty days after the acceptance and approval of satisfactory proofs. This certificate of shares is issued to and accepted by the holder thereof upon the following express terms and conditions:

First. The shareholder agrees to pay or cause to be

paid a monthly installment of seventy-five cents on each share named in this contract, the same to be paid on or before the last Saturday of each month until such share matures or is withdrawn.

Second. If the shareholder shall fail to pay or cause to be paid any monthly installments on or before the last Saturday of each month, he shall pay a fine of ten cents per share for each and every month the payment may be in arrears.

Third. Stock in this association is non-forfeitable; but if a monthly payment on any share becomes past due and payable for a period of six months or more, such share shall be sold at auction for the purpose of paying the arrearages. The proceeds of the sale shall first be used to pay all back monthly payments and fines; the balance remaining after paying all accrued fines and monthly payments shall be paid to the member in whose name the stock stands at the time of sale. If the stock brings no more than enough to pay the accrued fines and monthly payments it shall be bid in by the association and canceled, and the amount standing to the credit thereof in the loan fund shall be divided among the other shares as profits.

Fourth. Members may withdraw their monthly installments at any time by first giving thirty days' notice, and will receive 6 per cent. annual interest on all shares of six months' standing and up to two years; the third year 7 per cent.; any time after the third year and before maturity 8 per cent.

Fifth. If a shareholder dies his personal representative may withdraw his shares at any time or continue on to maturity.

Sixth. At stated periods the profits arising from interest, premiums, fines and other sources, shall be apportioned among the shares in good standing.

Seventh. All payments must be paid to an authorized agent, or sent to the secretary at the home office by draft, express or money order, or registered letter. Individual drafts or checks not receivable.

Eighth. The association reserves the right at any

time to make an investigation in all cases prior to the approval of claims. 25

Ninth. The by-laws of this association, which are attached to and indorsed hereon, are a part of this contract and such by-laws and this certificate are to be construed together as part of the contract between the association and the shareholder.

Tenth. No shares shall be assignable or transferable on the books of the association, except by the shareholder paying a transfer fee of two dollars for entering the same, and upon consent of the association, indorsed thereon by the secretary after all dues and claims on the same have been paid.

Eleventh. It is agreed by all shareholders of this association that desire loans, that all money in the loan fund shall be sold at a uniform rate of ten per cent., bid as premiums on all loans. 26

Twelfth. No shareholder shall have any claim to any interest in the affairs, assets or funds of this association, nor the control of them, except as above specifically set forth, and assumes no further liability of any kind whatsoever except as hereafter described.

Thirteenth. In every case where this contract shall cease and determine, or become null and void, then all payments made thereon shall become forfeited to the association.

Fourteenth. Any action brought against this association shall be commenced within six months after filing proofs, and in the county of Onondaga, and State of New York. 27

Fifteenth. No agent has authority to change this contract in any way, and the association assumes no obligation for any statements not contained in its printed literature.

Given under the seal of said association at Syracuse, New York, the second day of Feb'y, A. D. 1891.

H. H. Loomis, *President.*

[L. S.] Jno. J. W. Reynolds,
Secretary and Gen'l Manager.

28 Attached to this were the by-laws of which only the following are deemed material:

Article I.

SECTION 3. The principal place of business of this association shall be located at Syracuse, N. Y., but the branches or agencies may be located and business done in any part of the State of New York, or in any other State or Territory of the United States where no legal prohibition exists, by authority of the board of directors, to be evidenced by a vote of a majority of the board, and spread upon its records.

Article IV.

29 SECTION 1. The annual meeting of the stockholders shall be held at the home office of the association on the second Monday of May of each year commencing with the year 1891, between 2 and 4 o'clock p. m., of which due notice shall be given according to law.

Article XIX.

Contract of members.

SECTION 1. The terms and conditions expressed in the certificate of stock, in connection with the application for membership and the by-laws of the association, form the contract between the association and each shareholder therein.

30 SEC. 16. All remittances for advance installments, premiums, monthly installments, fines and penalties, interest and premiums, and all other payments, shall be made to the secretary of the association at the home office, and in registered letter, express or money order or drafts. Individual checks shall not be received.

Article XVI.

Local boards.

SECTION 1. Whenever sufficient stock has been sold in any town to make it advisable the members residing in each town may organize a local board or

branch of the association. The officers of the local 31
organization shall consist of a board of from five to nine directors, from whose number shall be elected a president, secretary and treasurer (combined) and attorney; all of whom must be shareholders in the association; these officers shall hold office one year and until their successors are elected.

SEC. 2. The traveling agents of the association are given authority to appoint the first officers of the local board. Provided, however, that officers so appointed shall only hold office until the members of the local board meet and elect their successors.

SEC. 3. It shall be the duty of the officers of the local board to pass on all applications for loans which are received by the association from members resid- 32
ing in the town where such local board is located, and to protect the interest of the association in all practicable ways.

SEC. 4. Members may, if they so desire, make monthly payments on stock to the local treasurer. But such local treasurer shall be deemed to be the agent of the members, and not of the association.

SEC. 5. As soon as the officers of the local board have been appointed or elected, and the names of such officers have been certified to the association by a traveling agent or by the local secretary, a local board charter shall be issued to such board.

SEC. 6. The president of the local board shall call a meeting thereof whenever three members shall re- 33
quest him so to do.

On the 20th of March, 1891, Bedford made an application for a preference for an advance which was forwarded through the same soliciting agent to Syracuse. Bedford described in detail the real estate upon which he proposed to give the association a mortgage. This application was approved May 18, 1891, by the board of directors at Syracuse. Bedford then applied on June 20th for the loan in the letter following:

34 *Application for an Advance.*

To the board of directors of the Eastern Building and Loan Association of Syracuse, N. Y.

GENTLEMEN: At a regular meeting of your board, held May 18, 1891, having obtained the preference for an advance on forty-six shares of No. 4773 of your association, at a premium of ten per cent., I now respectfully request the advance be granted. I hereby agree to comply with the charter and by-laws of your association and all requirements defined by your committee of the board of directors.

H. L. BEDFORD,
Applicant.

35 Witness:
J. H. T. MARTIN.

This letter was accompanied by a mortgage to the association, duly executed and acknowledged by Bedford and wife before a notary in Shelby county, Tennessee, of the land in that county previously tendered as security. The mortgage had been duly recorded in Shelby county.

The defeasance clause of the mortgage was as follows:

"This grant is intended as security for the payment of the sum of fifty-six hundred, eighty three and $\frac{8}{100}$ dollars, the same being the principal, interest and premium of a loan from said association, which said loan was made pursuant to and accepted under the provisions of the by-laws of said association, and which said by-laws have been read by the mortgagor, H. L. Bedford, and are made a part of this contract, which said loan is evidenced and secured to be paid by seventy-eight (78) certain promissory notes of even date herewith, executed by the said H. L. Bedford, payable to the said association at its office in Syracuse as follows: One of each of said notes to be paid on or before the last Saturday of each and every month until all of said seventy-eight notes are fully paid, together with the inter-

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est, and each of said notes after maturity at the rate of six (6) per cent. per annum, payable semi-annually until said notes are fully paid. And the said mortgagor, H. L. Bedford, for himself and his heirs, executors, administrators and assigns hereby covenants and agrees with the party of the second part, its successors and assigns to pay said principal, interest and premiums at maturity and the interest accruing on said notes after maturity and all fines and penalties that may be imposed pursuant to the provisions of the constitution and by-laws of said association, and also to keep and perform all promises and engagements made and entered into with said association according to the true intent and meaning of its by-laws and articles of association, and also to keep the buildings erected and to be erected upon said premises insured against loss or damage by fire in an amount and in such manner and in such company as shall be most satisfactory to the party of the second part, its successors or assigns, so that the loss or losses, if any, shall be payable to it or them, and from time to time when taken out issued on said premises, which policies shall contain the best and most approved form of mortgage clause. And at once to make due proofs in case of loss and do all other things required, deliver over to it or them all policies and renewals thereof by said policies, and also pay and discharge when due and payable all taxes, assessments, rates and other charges now or hereafter levied or assessed upon said premises and remove all adverse claims, clouds and encumbrances, also that until full payment of the money hereby secured nothing shall be done or suffered whereby said premises shall be diminished in value or any of said policies of insurance affected or vitiated.

In case default shall be made in effecting such insurance or in paying, discharging or removing such taxes, assessments, rates, other charges, adverse claims, claims or encumbrances as aforesaid,

it shall be lawful for said second party, its successors or assigns, to effect such insurance and pay such taxes, assessments, rates, other charges, adverse claims, choses or encumbrances, and the amount so paid shall be a lien on said premises added to the amount secured by these presents and forthwith due and payable without demand, with interest, and may be collected in the same manner as the principal sum hereby secured. And it is hereby expressly agreed by and between the parties to these presents that if default be made in the payment of any one of said notes or any part thereof as herein provided or in case of waste or non-payment of the taxes, assessments or impositions on said premises, or in case of neglect or refusal to keep the premises insured as herein provided or in case the improvements thereon shall not be kept in good condition or repair, or in case of a breach of any of the covenants or agreements contained herein, or in case of failure to duly observe and keep the by-laws of the said association and in either or any of such cases, the whole of the said principal sum, interest, premiums, fines, dues and costs, shall at once become due and payable at the option of said association, its successors or assigns and it shall be lawful for said association or its successors or assigns at any time thereafter to sell the said premises hereby granted, or any part thereof, in the manner prescribed by law and out of the moneys arising from such sale to retain the amount due and unpaid for principal, interest, premiums, fines, dues and costs thereof, taxes, assessments, impositions, insurance and other advances, together with the costs and charges of making such sale, and the overplus, if any there be, shall be paid by the party making such sale on demand to the said H. L. Bedford, or his heirs or assigns. And this conveyance shall be void if full payment of the aforesaid moneys, with principal and interest, be made as hereinbefore specified, and if the aforesaid covenants and each of them be well and truly kept and performed as herein specified and provided."

The seventy notes were all of the same tenor, 43
mutatis mutandis, as the following:

On or before the last Saturday of June, 1893, I promise to pay seventy-two and 86-100 Dollars, $72 86-100, to the order of the Eastern Building and Loan Association at its office in Syracuse, N. Y. Value received. Bailey, Tenn., May 1, 1891.

H. L. BEDFORD.

The business of the association in Tennessee had been lawful down to March 26, 1891, when the following act was passed by the legislature of Ten- 44
nessee:

CHAPTER 122.

An act to amend chapter 31 of the Acts of 1877, declaring the terms on which foreign corporations organized for mining or manufacturing purposes may carry on their business and purchase, hold, and convey real and personal property in this State, so as to make the provisions of said act apply to all foreign corporations that may desire to own property or to do business in this State.

SECTION 1. Be it enacted by the General Assembly of the State of Tennessee, That chapter 31 of the 45
Acts of 1877 be so amended and enlarged as that the provisions of said act shall apply to all corporations chartered or organized under the laws of other States or countries for any purpose whatsoever which may desire to do any kind of business in this State.

SECTION 2. Be it further enacted, That each and every corporation created or organized under or by virtue of any government other than that of this State, for any purpose whatever, desiring to own

property or carry on business in this State of any kind or character, shall first file in the office of the secretary of the State a copy of its charter and cause an abstract of same to be recorded in the office of the register in each county in which such corporation desires or proposes to carry on its business or to acquire or own property, as now required by section 2 of chapter 31 of Acts of 1877.

SECTION 3. Be it further enacted, That it shall be unlawful for any foreign corporation to do or attempt to do any business or to own or to acquire any property in this State without having first complied with the provisions of this act, and a violation of this statute shall subject the offender to a fine of not less than $100 nor more than $500, at the discretion of the jury trying the case.

SECTION 4. Be it further enacted, That when a corporation complies with the provisions of this act it shall then be, to all intents and purposes, a domestic corporation, and may sue and be sued in the courts of this State, and subject to the jurisdiction of the courts of this State just as though it were created under the laws of this State.

SECTION 5.--Be it further enacted, That when such corporation has no agent in this State upon whom process may be served by any person bringing suit against such corporation, then it may be proceeded against by an attachment to be levied upon any property owned by the corporation, and publication, as in other attachment cases. But for the plaintiff to obtain an attachment he, his agent or attorney, need only make oath of the justness of his claim, that the defendant is a corporation organized under this act, and that it has no agent in the county where the property sought to be attached is situated upon whom process can be served.

SECTION 6. Be it further enacted, That said chapter 31 of the Acts of 1877, except in so far as the same is amended, enlarged and extended by this act, be and the same is declared to be in full force.

SECTION 7. Be it further enacted, That this act take effect from and after its passage, the public welfare requiring it. 49

Passed March 21, 1891.

THOMAS R. MYERS,
Speaker of the House of Representatives.
W. C. DISMUKES,
Speaker of the Senate.

Approved March 26, 1891.
JOHN P. BUCHANAN, *Governor.*

Upon the same date an act was passed concerning building associations. The part thereof relating to foreign building associations was as follows: (Chapter 2 of the Acts of 1891.) 50

SEC. 3. Be it further enacted, That no building and loan association organized under the laws of any other State, Territory or foreign government, shall do business in this State unless said association shall (deposit and continually thereafter) keep deposited in trust for all of its members and creditors, with some responsible trust company, or with some State officer of this or some other State of the United States, mortgages (or other securities) received by it in the usual course of its business amounting to not less than twenty five thousand ($25,000) dollars, nor more than fifty thousand ($50,000) dollars, at the discretion of the State treasurer. All of the personal obligations of its members taken in the ordinary course of business of such association, and secured on first mortgage on real estate, all dividends and interest which may accrue on securities held in trust, as aforesaid, by the trust company or the State, as provided herein, and all dues or monthly payments which may become payable on stock pledged as security for loans, the mortgages for which are on deposit in accordance with the provisions of this act, may be collected and retained by the association depositing such securities 51

or mortgages so long as such association remains solvent, and faithfully performs all contracts with its members. Any securities on deposit, as provided herein, may from time to time be withdrawn, if others of equal value are substituted therefor. Every building and loan association organized under the laws of any State, Territory or foreign government shall, before commencing to do business in this State,

First. File with the treasurer of this State a duly authenticated copy of its charter or articles of incorporation.

Second. File with the treasurer of this State the certificate of the proper State officer of another State, or the president and treasurer of some responsible trust company, certifying that it has on deposit securities, not less than $25,000, taken in the regular course of business, as mentioned in this act, in trust for all the members and creditors of such building and loan association.

Third. File with the State treasurer a duly authenticated copy of a resolution adopted by the board of directors of such association stipulating and agreeing that if any legal process affecting such association be served on said State treasurer, and a copy thereof be mailed, postage prepaid, by the party procuring the issuing of the same, or his attorney, to said association, addressed to its home office, then such service and mailing of such process shall have the same effect as personal service on said association of this State.

Fourth. Pay the State treasurer twenty-five ($25) dollars as fees for filing the papers mentioned in this section.

SECTION 7. Be it further enacted: No officer, director or agent of any foreign building and loan association shall, in this State, solicit subscriptions to the stock of such association, or sell, or knowingly cause to be sold or issued, to a resident of this State any stock of an association while said association has not on deposit securities as required by section 3 of

this act, or before said association has complied with all the provisions of this act. License to agents of such companies or associations shall be issued by the treasurer, annually, on the first of January, and said treasurer is authorized to collect from each agent for said license $2 fee. Any violation hereof shall be deemed a misdemeanor, and upon conviction shall be punished by a fine of not less than ten dollars, or more than fifty dollars. 55

The association filed its charter with the secretary of state of Tennessee on the 11th day of August, 1893, and filed an abstract of the same in the office of the register of Shelby county on August 15, 1893. 56
The association did not comply with the building association laws quoted above in any respect

There is no evidence that the association solicited stock subscriptions after March 26, 1891, but it does appear that it made several loans of the same kind as the Bedford loan upon stock already subscribed for, after that date.

The supreme court of Tennessee has decided that notes and a mortgage executed under similar circumstances, and made payable in Minnesota, are Minnesota contracts, but that they are, nevertheless, void in Tennessee, and cannot be enforced in the courts of Tennessee. United States Savings & Loan Company *v.* Miller, 47 Southwestern Rep., 17, affirmed on appeal by supreme court, December 18, 1897, without written opinion. 57

Bedford defaulted in his payments on the notes, and the association filed a bill in equity in the circuit court of the United States for the western district of Tennessee to foreclose the mortgage and collect the amount due under his contract. The defendant, Bedford, answered, averring that the notes and mortgage were in violation of the above-quoted laws of Tennessee, and were void, and could not be enforced. (Transcript, p. 122, fol. 155, to p. 133).

58 Such are the facts of this case as understood by the Judges of the Circuit Court of Appeals for the Sixth Circuit, and by them certified to this Court.

The Opinion of Judge Hammond.

Upon the hearing of this case in the United States Circuit Court for the Western Division of the Western District of Tennessee, the Hon. E. S. Hammond, District Judge, presiding upon the hearing, in deciding the case for the complainant, made a very full statement of the facts and then delivered an opinion reviewing at length the questions in con-
59 troversy in that court and now brought to this court for final determination. It will, perhaps, serve the convenience of the Court to have us here embody Judge Hammond's statement of the case and his opinion based upon the facts as he understood them. Such statement and opinion are as follows:

Circuit Court of the United States for the Western Division of the Western District of Tennessee.

EASTERN BUILDING AND LOAN ASSOCIATION
vs.
H. L. BEDFORD and WIFE. } In Equity.

60 Bill to foreclose a mortgage.

Opinion. Filed June 4, 1898.

By an act of the legislature of the State of Tennessee of March 28th, 1891, ch. 2, entitled "An act to regulate the business of building and loan associations" it was required that no building and loan association, organized under the laws of another State should do business in Tennessee unless said association should deposit and continually thereafter keep deposited in trust for all its members and creditors, mortgages amounting to not less than twenty-five thousand dollars or more than fifty thousand

dollars, at the discretion of the treasurer. They 61
were also required before commencing to do business to file with the treasurer of the State a duly authenticated copy of their charter or articles of incorporation and a certificate of deposit of the valid securities required.

By another section the officers, directors or agents of foreign building and loan associations were forbidden to solicit subscriptions to their stock in that State or to sell or knowingly cause to be issued to a resident of the State any stock of the association unless a deposit had been made in accordance with the terms of the act, and it had otherwise complied with its provisions. Agents were required to be licensed by the treasurer, for which they were to 62
pay a fee of two dollars, and he was also to receive a fee of twenty-five dollars for filing the papers mentioned in the act. Any violation of the prohibition against the sale of stock without a compliance with the act was made a misdemeanor, and punished as such by fixed penalties.

By another act of March 17th, 1891 (ch. 95), chapter 31 of the Acts of the Legislature of Tennessee for the Year 1877, being sections 1992 to 2063 of Milliken & Vertrees Code, was amended so as to apply that act to corporations, chartered under the laws of other States, known as building and loan associations and other specifically enumerated corporations. 63

The act of 1877, carried into Milliken & Vertrees Code, was an act for the encouragement of mining and manufacturing corporations, which were required, if desiring to carry on their business in this State to file in the office of the secretary of state a copy of their charters or articles of incorporation, and such corporations were to be deemed and taken to be corporations of this State subject to its jurisdiction, to sue and be sued therein in the mode and manner directed by law in the case of corporations created and organized within the State. Then the act conferred the privilege of acquiring and holding

64 real property, which was made liable for its debts. The act gave resident creditors priority. Taxation was regulated. Rights of way were given for the maintenance of roads, bridges, canals, tramways, telegraph lines, etc.; but they were required to begin business within a year, it being declaredto be the object of that act to secure the opening and development of the mineral resources of the State, to facilitate the introduction of foreign capital, etc.; and such corporations were authorized to establish villages and settlements for the use and residence of its employés and others; and the sale of liquor was prohibited within a radius of five miles of such village and settlements.

65 Subsequently, by an act of March 26, 1891, ch. 122, this act, ch. 31, 1877, was extended to all corporations chartered or organized under the laws of other States or countries for any purpose whatsoever, which may desire to do any kind of business within the State of Tennessee. This last act further required that a copy of the charter should be filed with the secretary of state and an abstract thereof, in every county in which a foreign corporation desired to do business. And then, by section 3, it was enacted that—

"It shall be unlawful for any foreign corporation to do or attempt to do any business or own or acquire any property in this State without first hav-
66 ing complied with the provisions of this act, and a violation of this statute shall subject the offender to a fine of not less than one hundred dollars, nor more than five hundred dollars, at the discretion of the jury trying the case."

And, by section 4 when the corporation had complied with the provisions of the act it should be to all intents and purposes a domestic corporation of the State, and if it had no agent in the State upon whom process could be served it was liable to attachment, to be levied upon any property owned by the corporation. The last section of the act re-

enacted the provisions of chapter 31 of the Acts of 67
1877, thus extending all the privileges of that original act to all corporations whatever, coming into the State to do business.

The plaintiff is a building and loan association of the State of New York, having its location at the city of Syracuse, which has never complied or attempted to comply, except as hereinafter stated, with any of the foregoing acts nor with a subsequent act known in the legislation of the State as the "curative act" of May 10th, 1895, chap. 119, which authorized corporations that had been doing business in the State contrary to the provisions of the former act, to file their charters as required, and be relieved of the penalties and forfeitures in- 68
curred, but with the important provision that no suit should be instituted upon any contract thus made valid until after two years from the passage of the act.

By the charter of the plaintiff company it was authorized to establish a local board anywhere, to be composed of its members in that locality to assist in carrying on its business, it being a mutual company. It had a firm of agents in Memphis, Shelby county, Tennessee, and also a local board, composed of members thereabouts. On the 23rd day of January, 1891, before the passage of any of the foregoing acts, except that of 1877, the defendant signed in Shelby county, Tennessee, a written ap- 69
plication for shares in the plaintiff association in the form prescribed for the purpose, and customary in doing its business. This application was forwarded by mail through the above agents to the plaintiff company, at its home office in Syracuse, New York. The application was granted by the board of directors at the home office, and on February 2nd, 1891, a certificate for forty-six shares of the stock, amounting to forty-six hundred dollars, was issued to the defendant, being sent to him by mail through the Memphis agents. According to the scheme of the company this stock was to mature by the payment

70 of its dues and assessments on the first of August, 1891. These dues and assessments were payable at its home office, in Syracuse, N. Y., but a by-law authorized them to be paid to the local board or agent where the stockholder resided, if the stockholder so desired.

On March 20th, 1891, the defendant made a written application for a loan, which, according to the custom of the company, was sworn to, and appraisers appointed by the local board indorsed on the application a sworn appraisement of the property which was offered as security. In this application for a loan of forty-six hundred dollars for six and a half years, it was stated that the loan was
71 to bear interest at the rate of 5 per cent. per annum and a premium of 5 per cent. per annum payable annually on or before the last Saturday of each month, "all payments to be made as the lender may direct," and to secure the same the defendant agreed to give a mortgage upon the property offered as security. This application and appraisement, like the application for stock, was sent by the agents through the mail to the home office, at Syracuse, New York; and on the 18th of May, 1891, the board of directors at Syracuse, in the State of New York, recommended and approved the loan. Subsequently, Bedford made a written application, again sent through the mails, for what is called "an
72 advance of loan," and referred to the resolution of the board of directors of May 18th, 1891, allowing the advance at "a premium of ten per cent.," attached to which written application was the affidavit of one of the agents, which was again forwarded to the board of directors by mail. The defendant and his wife then executed a mortgage upon real estate situated in Shelby county, Tenn., dated May 1st, 1891, duly and properly acknowledged June 18th, 1891, filed for record June 20th, 1891, and duly recorded in the register's office of Shelby county. This mortgage acknowledged the receipt of forty-six hundred dol-

lars and secured the sum of $5,683.08, the same 73
being the principal, interest and premium of the loan, evidenced by seventy-eight notes, dated Memphis, Tenn., May 1st, 1891, payable to said association at its office, in Syracuse, monthly." Having signed these notes at Memphis and recorded this mortgage, they were again forwarded by these agents, through the mail, to the home office, in the city of Syracuse, New York, and, thereupon the plaintiff company drew its draft on the Bank of Onondaga, at Syracuse, N. Y., in favor of the defendant, for the sum of $4,140, which, in due course of business was paid to him, or to his order, at Syracuse, New York. The shares of stock were withdrawn, duly receipted for, according to the customary method of doing 74
business.

The plaintiff company filed a copy of its charter with the secretary of state, on August 11th, 1893, and an abstract thereof in Shelby county, on August 15th, 1893, more than two years after the completion of this transaction, and before the passage of the curative act. The seventy-eight notes executed were all dated May 1st, 1891. Each was for $72.86, except the last three, which were each for the sum of $38.36. They were all payable to the order of the plaintiff company at its office, in Syracuse, New York, the first on or before the last Saturday of May, 1891, and each successive one on the last Saturday of every month thereafter up to and 75
including the last Saturday of November, 1897. These notes represented the amount of dues estimated to mature and become payable on the shares of stock which the defendant held until the same should mature and reach their par value from the payment of the dues, together with the earnings thereon and the interest and premium advance during that period. The shares of stock were also pledged as collateral security in addition to the mortgage.

The mortgage itself contained stipulations to pay the principal, interest and premiums, and to conform

76 to the constitution and by laws of the order, pay the fines and penalties prescribed thereby according to the true intent and meaning of the articles of association, keep the buildings on the premises insured against loss by fire, to pay all taxes, and to perform all other necessary things relative to said premises, which were imposed by the contract and by-laws of the association. The defendant further agreed to pay the monthly installment dues of seventy-five cents on each share. There was also a provision that if he should fail to pay any of the notes, shares or dues, the whole should become fully due and payable; that the shares of stock should be forfeited and the mortgage and contract should be immedi-
77 ately enforced.

The notes were all paid up to and including the last Saturday of June, 1893, since which time none of the notes, assessments, or dues have been paid.

This bill was filed to enforce the contract and foreclose the mortgage, on the 24th of June, 1895, a little more than thirty days after the passage of the curative act, and before the two years limitation thereof had expired.

HAMMOND, *J.* (after stating the facts as above):

The defense in this case is without a particle of merit, the defendant having received nearly five
78 thousand dollars of the plaintiff's money upon a loan secured by a mortgage upon his property in the ordinary way of such transactions. There is no reason why he should not pay the money back and no defence is offered except that the plaintiff being a foreign corporation had no right to make the loan until it had complied with certain administrative rules and regulations of the State of Tennessee concerning foreign corporations.

Naturally, repudiation of a debt admitted to be just, finds its protest at the bar from the plaintiff's counsel. That protest also must find response in judicial judgment, unless the courts are compelled

to sustain the defense upon some inexorable princi- 79
ple of law having its only justification in the maxim, *ita lex scripta est.*

For my part, I am not prepared to concede to State legislation that unrestrained absolutism of power over foreign corporations which is being built up by the usurpation and enlargement of the recognized right to regulate foreign corporations doing business in the State. Those corporations are not outlaws from all constitutional protection, because of this power to regulate them, nor because of a power to prohibit them from doing business in the State. That power of regulation or prohibition does not necessarily mean a power to forbid their home contracts with citizens of the foreign State and about 80
property in that State. It is not more imperious than the equally vaunted police power of a State which it was said by the Supreme Court "cannot be put forward as an excuse for oppressive and unjust legislation." Per Mr. Justice Brown, in Holden *v.* Hardy (Feb. 28, '98), 169 U. S., 366, 392; Davidson *v.* New Orleans, 96 U. S., 97; Yickwo *v.* Hopkins, 118 U. S., 356. And, as in the case of the police power, this exaggerated claim of absolute power over foreign corporations has received its check, first in the dissenting opinion in Hooper *v.* California, 155 U. S., 648, 657, and now in the judgment of the full court in Allgeyer *v.* Louisiana, 165 U. S., 578, and that, too, in relation to legislation similar to that set 81
up by this defense. What may be called the constitutional freedom of trade or right of contract as against such legislation has been fully sustained by the latest of these decisions both as against the police power, where the public health, morals or safety is not involved, and this power to regulate or prohibit the business of foreign corporations. "The question in each case," says Mr. Justice Brown, in Holden *v.* Hardy, *supra*, "is whether the legislature has adopted the statute in exercise of a reasonable discretion or whether its action be a mere excuse for

82 an unjust discrimination, or the oppression, or spoliation of a particular class."

When asked what public policy was at the back of the legislation of 1891, forbidding foreign corporations to do business in the State without having first registered their charters in every county in the State in which they proposed to do business and acquire property, counsel for the defendant replied that it was to prevent irresponsible corporations from getting a footing in the State and to advise the people as to the charter rights and privileges of the companies.

Plainly this is only administrative in its character, and is in no sense at all a policy which affects the
83 health, morals or general safety of the public, and, as applied to a contract like that we have under consideration there is no effect of the policy that in any sense disparages the contract. It is as harmless as it was before and in the nature of the public policy there is nothing to invoke that kind of protection which usually falls within the police power; and it is somewhat misleading, therefore, to attack the contract as being against public policy. The statute makes no distinction between responsible and irresponsible companies. Either may establish themselves by registering their charters.

As to the matter of information the defense has rather a flimsy foundation, for it is far more likely
84 that any one dealing with the corporation would depend upon the abundantly printed and circulated forms of the charter which in this day of cheap printing and rapid communication is all sufficient for the purposes of information, without the trouble of going to the county-seat to inspect the records. There does not seem to be much in this suggestion to invoke the principle of public safety or even the public welfare as a foundation for the policy stated. It is not to be presumed that the object of the legislature was to make repudiation easy by furnishing a defense like this to the vast number of people who have resorted to the loan and mortgage companies

to borrow money which they could not get at home and could get abroad at cheaper rates. Possibly the oft-reiterated charge that the real purpose of the legislation was to make fees for the registration officers in the different counties may furnish a clue to the kind of public policy which is the foundation of the legislation; but evidently, forfeitures of contracts are not to be enforced by the courts in aid of a public policy like that unless it must be done in loyal obedience to the command of the legislature. Certainly, however, it does not fall within the class of cases mentioned by Mr. Justice Brown in Holden *v.* Hardy, where the legislature may impose limitations upon the right of contract to prevent detriment to the well-being and safety of the people or their property. It cannot be denied, nevertheless, that the legislature of Tennessee had the right, and the courts must enforce it, to require foreign corporations to comply with these regulations and might affix any pains and penalties for that purpose which the legislature might choose—and that has been done by this act; so that if we had the malefactors against its prohibitions, and this were a case to enforce those penalties as in Hooper *v.* California, *supra*, we might be compelled to do it.

But when it is claimed that this act makes the contract between the borrower and the lender void or non-enforceable in the courts, it is another matter, which requires the strictest scrutiny before such a penalty can be invoked against the natural justice and the greater public policy of encouraging the enforcement of fair contracts and compelling borrowers to repay the money which they have borrowed.

It seemed to be conceded in the argument by the plaintiff's counsel that the supreme court of Tennessee does not recognize any distinction between statutes which in their terms declare that a contract shall be void as one of the penalties imposed, and those which do no more than prohibit the doing of a thing and impose a penalty; and that by our Ten-

88 nessee law if the thing is prohibited any contract concerning it is void without any explicit declaration of the statute to that effect, and without reference to the fact whether the statute imposes other penalties or not. Stephenson *v.* Ewing, 87 Tenn., 46; State *v.* Insurance Co., 92 Tenn., 420; Haywortb *v.* Montgomery, 91 Tenn., 16; Anderson *v.* R. R. Company, 91 Tenn., 46; R. R. Company *v.* Evans, 66 F. R., 809.

It is not necessary in this case to go into a critical examination of the Tennessee cases to determine whether or not they go to the extent of declaring the contract void or only to that of declaring that the courts of Tennessee will not enforce them,
89 which, be it remembered, are two distinct results, the difference being all-important. If the contracts be void they should not be enforced anywhere, but if there be only a prohibition on the courts of the the State from enforcing them they might be enforced elsewhere; and as well probably in the Federal courts sitting in the State of Tennessee, which are not subject to the prohibitions of the Tennessee legislature relating to the State courts. We are relieved from any considerations like these from the fact that this contract, in our judgment, was one over which the State of Tennessee had no power whatever, except possibly to deny its enforcement by the courts of Tennessee, though that is very doubtful.

90 This was a New York contract; made in New York, to be performed there, and not in any sense a Tennessee contract. The making of such a contract is not doing business in Tennessee and does not fall within the prohibitions of the statute. Essentially, it is not different in respect of this from the contract in the case of Allgeyer *v.* Louisiana, *supra*, 165 U. S., 578; nor Pioneer Savings Co. *v.* Cannon, 96 Tenn., 599; nor Lauter *v.* Jarvis-Conklin Mortgage Co., 85 F. R., 894; nor Cæsar *v.* Cappell, 83 F. R., 403; nor Jarvis-Conklin Mortgage Co. *v.* Wilhoit, 84 F. R., 514.

It is contended that the case of New York National

Building and Loan Association *v.* Cannon (Knox- 91
ville, Sept., 1897), 41 S. W. R., 1054, —Tenn.—has authoritatively settled that the contract is void and that the Federal courts are bound by that decision. It does not appear from the report of that case whether the notes were payable in New York or Tennessee, though an inference that they were payable in New York is insisted upon by counsel for the defendant. It is true that in that case it was decided that the building and loan association was doing business in Tennessee contrary to the prohibitions of the statute, citing Lumber Co. *v.* Thomas, 92 Tenn., 589; Manufacturing Co. *v.* Gordon, 93 Tenn , 597. But it is to be particularly noted that the court does not decide 92
that the contract was void no matter whether it was a New York or a Tennessee contract, but only that "the court of chancery appeals was correct in holding that the contract was illegal, and could not be enforced by the court and in refusing to foreclose the mortgage of the building and loan association." If that be true of the Tennessee State courts it is not necessarily true of the Federal courts, as before intimated. It is a familiar principle that the Federal courts do not follow the penal statutes, imposing penalties of prohibition that relate only to matters of procedure and practice or to matters of jurisdiction. The legislature of a State cannot shut up the Federal courts nor deny parties access thereto. 93
They may prescribe rules of property and declare contracts within their jurisdiction null and void, and thereupon the Federal courts will enforce the rules of property and refuse to enforce the void contracts; but if the legislature leaves the contract valid, enabling parties to enforce it within jurisdictions that are not amenable to the legislature of the State of Tennessee, I see no reason why the Federal courts may not enforce such contracts, although their enforcement is prohibited to the courts of the State.

This is not, however, to be misunderstood as applying to those cases where the legislation is the ex-

94 ercise of a police power, which fixes a public policy that appertains to the health, morals or safety of the State, to use again the language of Mr. Justice Brown in the case above cited. That class of cases is very near akin to those constituting rules of property. At all events the Federal courts will not enforce contracts that are vicious because they are contrary to the declared will of the legislature exercising that care for the health, morals or safety of the public, to which we have adverted. But it does not follow from this that they will refuse to enforce valid contracts that are harmless in themselves and non-enforceable in the State courts, only because they are not in conformity to certain prescribed
95 preliminary rules and regulations of an administrative character necessary to be complied with before suit can be brought upon them in the State courts. I do not stop to support this enunciation by the citation of authorities for the reason that it is not depended upon in favor of this judgment.

Whatever respect we may and should have for the adjudications of the supreme court of Tennessee in construing State statutes, it is not imperative that we shall follow a decision which is contrary to our own Federal decisions above cited, and one which has been made long after this contract was entered into and after the rights of the parties therein had fully attached. In such cases it is open to us to fol-
96 low our own decisions and exercise our own independent judgment as to the validity of these statutes.

The rule on this subject is nowhere so well expressed as in the case of Louisville Trust Co. *v.* City of Cincinnati, 76 F. R., 296, in which case Judge Lurton was careful to collate the cases on the subject and to declare the correct rule for our guidance. Burgess *v.* Seligman, 107 U. S., 20.

Another observation upon the case of The New York B. and L. Ass'n *v.* Cannon, *supra*, is worthy to be noted here, and that is that although the contract was declared illegal and not enforceable in the

State of Tennessee, the result was so shocking to 97
the sense of justice of that court that it resorted to
the well-known principle that one asking equitable
relief must himself do equity and compelled the
debtor to repay the money borrowed out of the funds
realized by the sale of the property, notwithstanding
the so-called illegality of the contract, thereby sub-
stantially enforcing it, notwithstanding the prohi-
bitions of the statute.

But conceding all that may be claimed for that
case, and admitting that it is a fair inference from
the statement of facts that that contract like this
was to be performed in the State of New York and
not in the State of Tennessee, the final and all-suffi-
cient answer to it is that if the supreme court of 98
Tennessee has properly construed the statute, it is,
in our judgment, declared unconstitutional by the
Supreme Court of the United States in the above-
cited case of Allgeyer *v.* Louisiana, 165 U. S., 578,
just as a similar statute of Louisiana similarly con-
strued by the Supreme Court of that State was de-
clared unconstitutional.

In Caesar *v.* Cappell, *supra*, this court had occa-
sion to examine the authorities upon which the rul-
ing is based that a promissory note payable in the
State of New York is a New York contract to which
the giving of a mortgage in Tennessee is only an in-
cident and not a part of the contract, and it is only
necessary to refer to the reasoning and treatment of 99
the cases found in that opinion. I adhere to that
opinion, and hold that the facts in this case which
are not unlike the facts in that case, do not change
the rule there laid down. It is true that there is
much more ground on the facts of this case for the
contention that the business was done in Tennessee
than there was in the case of Allgeyer, above cited,
but this is only a superficial view of the subject. In
the Allgeyer case the property insured was in the
State of Louisiana; the owner making the contract
of insurance was in Louisiana; that which he did to
put the contract into being was done in Louisiana,

100 by writing and depositing a letter in the post office at New Orleans. The agency which he used in his business was the telegraph and its operators or the post office and its officials. They were all in Louisiana and necessary agencies in the completion of the contract, and yet it was held that this was not doing business in the State of Louisiana because the contract was to be performed in New York, the premiums were to be paid there, the losses, if any, were to be paid there, which made it a New York contract, and the Supreme Court say that if the supreme court of Louisiana was correct in holding that the Louisiana statute forbade the doing of those things in Louisiana because the company had not complied
101 with statutes of prohibition similar to this we have in this case, the statute was in violation of the fourteenth amendment to the Federal Constitution by depriving the parties of their liberty without due process of law—that is to say, the freedom to make a contract of insurance to be performed in the State of New York.

We must not be misled by the suggestion of counsel for the plaintiffs that in the Allgeyer case it was especially noted that the defendant had no agent in Louisiana, thereby inferring that if the company had had an agent in Louisiana the decision would have been otherwise. That is a mistaken reading of the case. The constitution of Louisiana
102 contained a provision that no foreign corporation should do business in the State without having one or more known places of business and an authorized agent or agents in the State upon whom process might be served, and the court adverted to the fact that there was no known place of business and no agent in the State as a circumstance to show that the company was not doing business in the State and as an indication of what was meant by that phraseology in the legislation then under consideration. It is not at all to be inferred from this that if the insurance company had made this contract through the agency of some solicitor who performed

the function of mailing the correspondence by 103
which it was effectuated instead of that correspondence being mailed by the insured himself, the decision would have been otherwise than it was, and that is all the difference there is in this case. There, Allgeyer wrote and mailed his own letters which were necessary to complete the contract. Here, defendants' application and subsequent acceptance were also transmitted through the mails albeit by the instrumentality of his own agents or fellow-members of the building and loan association acting in the city of Memphis. These were only his messengers or agents, to put his letters in the mails.

The essential facts are that he applied in the State of New York by mail for a loan and the acceptance 104
of his offer was had in the State of New York and transmitted to him by mail through the same agents as before. The contract was that he would pay the money, principal and interest, in New York, which made it a New York contract, and the fact that the debtor gave him the privilege of paying it here in Memphis if he chose to do so, does not at all affect that circumstance. The most that can be said upon the facts of this case is that the preliminary negotiations for the contract took place in Tennessee. It may be that the agents through whom they were carried on were, in the sense of the Tennessee statute as to those negotiations, doing business in that State contrary to the statute; and 105
it may be that the Supreme Court will refuse to hold that the fourteenth amendment protects the defendant in his right to borrow money in the State of New York, and to mortgage his Tennessee land as security for it if he does the business through such agencies; and may confine that valuable constitutional protection to the bare use of the mails, but I do not see why any such distinction should be made. If it be a sound distinction the utmost that can be claimed is that the preliminary negotiations themselves were illegal and subjected the offending parties to the penalties of the statute, as in Hooper

106 *v.* California, *supra*, but this does not change the ultimate fact that the defendant here and plaintiff there entered into a contract in the city of Syracuse, New York, for the loan of the money and the mortgage of the property. It was there in Syracuse that their minds came together through whatever agencies may have been used for that purpose, and the contract of lending or borrowing and mortgaging was done in the city of Syracuse, New York, and not in the city of Memphis and therefore the statute of Tennessee has no application to it. That part of the business was not done in Tennessee, and it is only that part with which we are dealing in this case.

107 I understand the case of Allgeyer *v.* Louisiana to settle that it is not within the competency of the legislature to prohibit a citizen of Tennessee from borrowing money in New York from a citizen of New York and giving a mortgage upon his property in Tennessee to secure it and the fact that the lender is a New York corporation does not at all alter the right both of the defendant to make the contract of borrowing and of the corporation in New York to make the contract of lending, according to its capacities in that State. The law of New York is the *lex loci contractus* in such cases and not that of the State where the borrower resides. That is both the business and the legal status of the transaction.

108 It is only a question of how the parties shall get together to make their contract. It seems to me quite preposterous to say, as was suggested in the argument, that the borrower must physically leave the State of Tennessee and be physically present in the State of New York in order to make such a contract valid. It seems to be agreed by the defendant's counsel that if such physical presence in New York had occurred, this contract could be enforced. It is decided in Allgeyer's case that it can be enforced if the contract is made through the agency of the mails, that it to say, through the functions of the postmasters.

I suppose it would be agreed that if the defendant had made the same contract through the agency of the express company that it would not have been illegal; or if he had put a messenger on the cars and sent him with a power of attorney to the city of New York, it would not have been illegal. Now why is it any more illegal to negotiate through persons in Tennessee who are willing to take the burden of attending to the details and transmitting their correspondence through the mails? For my part I do not see any distinction that can be fairly drawn, upon the circumstances, between the two cases. 109

We have, then, the broad principle, that a contract of borrowing and lending to be performed in the State of New York is the doing of that business within the State of New York, and not within the State of Tennessee, no matter how or what agencies are used for the purpose, and no matter what punishments may be inflicted upon those who dare to accept such agencies within the State of Tennessee. 110

And, moreover, we have in the Allgeyer case the broad principle that the right of the citizen of Tennessee to make such a contract of borrowing and of the New York corporation, such contract of lending, cannot be prohibited by the legislature of the State of Tennessee; and it is a misapplication of the power of the State of Tennessee over foreign corporations to assume that it can exercise any such prohibitions upon the freedom of contracts. The whole argument in behalf of this defense, proceeds upon the false assumption, in my judgment, that it was a contract made within the State of Tennessee. 111

It may be that this will very much narrow and limit the operation of this act of Tennessee, but I cannot see that that is any objection to the ruling here made. It may be that if the foreign corporations can thus "do business" in Tennessee, we emasculate the power of the State of Tennessee to prevent their "doing business" in that State; but all this is a mere play upon the words, as the only

112 effect of the ruling is to confine the power of the State to that class of prohibitions which prevent the foreign companies from becoming, *pro hac*, Tennessee corporations. That is the privilege given them by the original statute, and all the later statutes that if they will comply with their provisions they shall in effect, become domestic corporations. Indeed the conception of the original statute is one of encouragement and indulgence, and not prohibition; and the fallacy of the defense is that unless they become domestic corporations they shall not be allowed to make contracts with the citizens of Tennessee at all. How far they may go in that direction we need not decide, but we have now the
113 authority of the Supreme Court of the United States for saying that the legislature cannot go to the extent of prohibiting the making of a contract to be performed in the State of New York. There is no anomaly in this position, for, in the former opinion upon this question I cited the case of a Scottish railroad company which built its tracks within the territory of England, ran its traffic trains every day over that territory, kept its station houses and station agents there, and yet that was held not to be "doing business" within the territory of England. Cæsar *v.* Cappell, *supra*. Hazleton *v.* Miss. Valley Ins. Co., 55 Fed. R., 743, 750.

Reference has been made in the argument to a
114 Tennessee process act, chap. 226, of March 29, 1887, defining, for the purpose of serving process in suits brought against foreign corporations in Tennessee, what is to be, in the purview of that act, held to be "doing business" within the State. That is a special statutory definition for a special purpose and cannot be perverted to the purposes of an interpretation of another act where only a similar phraseology is used for an entirely different purpose. The truth is this phrase "doing business" within the State or "engaged in business" within the State is of such an indefinite and uncertain meaning, so vague and ambiguous, so elastic in its quality, that an act of

the legislature which uses it without defining it is almost nugatory for want of certainty as to its meaning; and following the well-known and cardinal rules of construction such phraseology will not be construed by the courts to prohibit harmless contracts, or to secure formidable forfeitures upon the mere literalism of the words used. If one should undertake to define the phrase by specific or particular designations of the things prohibited, he might be expected to encounter difficulties in doing what penal acts should do in respect of explicit definitions of the offenses created; and as well some lack of power to extend the prohibitions beyond the territorial limits of the State. It is not possible to build a Chinese wall around a State, so that a citizen of it shall make no contracts with a foreign corporation except by permission of the State. The Allgeyer case settles that the mail at least will break through such a prohibitory contrivance. 115 116

The defense of usury is untenable. The contract is not usurious under the laws of the State of New York, and in that respect the case certainly is governed by the above-cited case of Pioneer Savings Co. *v.* Cannon, 96 Tenn., 599, which holds that the usury laws of Tennessee can have no extra-territorial effect. It has always seemed to me that that case also is almost a direct judgment in favor of the ruling here that this was a New York contract. It decided under very similar circumstances that it was a Minnesota contract and therefore not subject to the usury penalties of the Tennessee statutes. If it was a Minnesota contract for the purposes of usury it was a Minnesota contract for the purposes of the prohibitions of the act 1891. 117

This view of the case makes it unnecessary to consider the contention of the plaintiff that the defendant is estopped to contest the validity of the contract, upon the ground that he is himself *particeps criminis* and acting in violation of whatever State law there may have been; that he is taking advantage of his own wrong and his own turpitude as a

118 violation of the statute as a defense to a debt voluntarily contracted and for which he has received full consideration. Also, upon the ground that having received and used plaintiff's money with full knowledge, necessarily implied, if not actually existing, of the plaintiff's alleged incapacity to contract in Tennessee, he is estopped to set up that incapacity as a defense upon much the same ground that one who deals with a corporation is estopped to deny the corporate character of the party with whom he deals. And, lastly, that the defendant was himself a member of this company at the time the act was passed, at the time he solicited the loan and at the time he made the contract; that it was a mutual company
119 for which he is as much responsible as the other members and therefore he will not be allowed to set up that its contract was illegal and void, but must leave it to the State to enforce whatever penalties and forfeitures may arise to him and his fellows because of his own illegal conduct, in joining a mutual company acting in the State in violation of the law, or what is the same thing remaining in the company after the act was passed.

It is possible that this is a good defense, but we need not decide the point. Gold Mining Co. *v.* National, etc., Bank, 96 U. S., 640, was a case where a defendant sued by a national bank which had loaned him money was not allowed to plead as a bar that
120 the bank had violated the act of Congress in lending a larger amount of its capital stock than had been actually paid in. There the court says, "we do not think that public policy requires or that the act of Congress intended that an excess of loans beyond the proportion specified should enable the borrower to avoid the payment of the money actually received by him."

In Cowell *v.* Springs Company, 100 U. S., 55, upon a breach of a condition in a deed that intoxicating liquors should not be manufactured or sold upon the premises, the grantee was not allowed to set up the invalidity of the title in defense of a suit

to enforce the terms of the condition. In Williams 121
v. Gideon, 7 Heisk. (Tenn.), 621, the principle is well settled that the creditor who has confirmed a fraudulent deed by receiving a benefit under it, or becoming a party to it is estopped from impeaching it. And there are many other cases holding that corporations acting *ultra vires* and making invalid contracts may nevertheless enforce them against persons who have received the benefit, upon the doctrine that they are estopped to deny the binding effect of that which they have done voluntarily and with full knowledge of the facts. Ohio R. R. Co. *v.* McCarthy, 96 U. S., 258; National Bank *v.* Matthews, 98 U. S., 621, where the court quotes with approval Mr. Sedgwick's statement that, "where it is a 122
simple question of authority to contract arising either on a question of regularity of organization or of power conferred by the charter, the party who has had the benefit of an agreement cannot be permitted in an action founded upon it to question its validity. It would be in the highest degree inequitable and unjust to permit a defendant to repudiate a contract the benefit of which he retains." Sedg. Stat. & Con. Law, 73; Whitney Arms Co. *v.* Barlow, 63 N. Y., 62; Sherwood *v.* Alvis, 83 Ala. 115; Ray *v.* Home, etc., Co., 98 Ga., 132; Macon R'y Co. *v.* Georgia R. R. Co., 63 Ga., 103; Poock *v.* La Fayette B. & L. Ass'n, 71 Ind., 657; Pancost *v.* Travelers' Insurance Co., 79 Ind , 172; Steam Nav. 123
Co. *v.* Weed, 17 Barbour, 378.

It must be conceded that this doctrine does not apply to contracts involving moral turpitude on the part of both contracting parties or those which have some infirmity that arises out of a violation of public policy and public law constituted and maintained for the safeguard of the public against dangers threatening the health, morals and safety of the people, but this power of regulating foreign corporations and the methods of doing their business within the State or prohibiting them from doing business within the State at all has no such foundation

124 as that. The laws are purely administrative and more directory than mandatory in their character.

At all events, if there are any cases involving the State's power over foreign corporations to which the doctrine of estoppel does apply, this case must fall within that class.

What has been said about the acts of 1891 applicable to all foreign corporations is equally applicable to the special act relating to building and loan associations of March 28th, 1891, ch. 2, p. 17, Acts 1891. That act is purely directory in its provisions. It does not impose any penalties for its violation nor does it contain anything prohibiting the doing of business within the State with-
125 out a compliance with its directions. Much less than the other acts can it be said to declare the contracts made by foreign building and loan associations without compliance with it void or to forbid their enforcement in the State courts. Its 7th section prohibits the officers, directors or agents from soliciting subscriptions of stock in this State or selling or knowingly cause to be sold or issued to a resident of this State any stock of the association without having deposited the securities required with the State treasurer; and it also requires the agents to have a license for which, as always, a fee is charged, and it punishes violation of this provision by making it a misdemeanor. Some penal-
126 ties are imposed upon domestic corporations for a violation of the directions requiring them to keep deposits with the treasurer, but there is not one line, word or syllable of the whole act which makes the contracts void. However, since the act of March 17th, 1891, ch. 95, and the act of March 26th, 1891, ch. 122, in their terms apply to building & loan as well as to all other corporations, the whole legislation may be taken as standing together, *pari passu*, upon the same footing one with another, and, taken altogether, it may be said that contracts falling within the prohibitions are not enforceable by the State courts of Tennessee, and perhaps not by the Fed-

eral courts sitting within the State, though, as be- 127
fore remarked, that may be doubtful. Yet, the fact remains, that a contract by any of these corporations to be performed in another State does not fall within the denunciations and prohibitions of the statute. These acts comprehend every foreign corporation whatever, and if they are to be construed and enforced in the manner suggested by this defense, they would make void and non enforceable every ordinary loan of money by a banking corporation in another State to a citizen of Tennessee carried on by a correspondence through the mails or through the agency of local banks and loan brokers, as well as every other commercial contract which can possibly be conceived, made with foreign corpo- 128
rations. It is inconceivable that the legislature had any intention to give the statute such effect as that, and the true spirit and meaning of the act is in my judgment found in the fourth section of the act of March 26, 1891, ch. 122, and also of the original act of 1877, M. & V. Code, sec. 1994, as follows:

"SEC. 4. That when any corporation complies with the provisions of this act it shall then be to all intents and purposes a domestic corporation, and may sue and be sued in the courts of this State, and subject to the jurisdiction of the courts of this State just as if it were created under the laws of this State." This means that foreign corporations may have the privilege of becoming Tennessee corpora- 129
tions by compliance with these statutes, and their domestication was the real purpose of all the acts. Foreign corporations that desire such domestication must comply with the provisions of these statutes, and if they carry on their business in the same manner that domestic corporations do and make their contracts to be performed within the State of Tennessee without compliance with these acts, then they are within the pains and penalties of the statutes. But if they confine their business to their own home places, make their contracts there, to be performed there, as was done in this case, they

130 are not within the pains and penalties of the acts, and such contracts are not affected by them. As to such contracts it is not within the power of the State to discharge or suspend their obligations. It may be within the power of the State by judicial construction of the act to close the courts of Tennessee to their enforcement, but they cannot close the courts of the United States to suitors who resort to those tribunals for enforcement of the contract. Says Mr. Justice Clifford, in Greene *v.* Commercial, etc., Bank, 3 Cliff., 494 (Fed. cas. No. 5755):

"Doubts may at one time have existed upon the subject, but it is now well settled that a State law cannot discharge or suspend the obligation of a con-
131 tract made in another State if it was legal where it was made and was a contract with a citizen of another State, not even if it was to be performed in the State whose law is invoked to defeat the remedy."

He cites Baldwin *v.* Bank of Newbury, 1 Wall., 236; Suydam *v.* Broadnax, 14 Pet., 74; Union Bank *v.* Jolly, 18 How., 503; Watson *v.* Tarpley, *id.*, 520; Hight *v.* Stone, 20 How., 175; Demerit *v.* Exchange Bank, 1 Brunner Cas., 598; Fed. Cas. No. 3780; Hunt *v.* Danforth, 2 Curtis, 592; Fed. Cas. No. 6887, in which Mr. Justice Curtis remarks—"No State law can *proprio vigore*, deprive this court of jurisdiction conferred by the Constitution and laws of
132 the United States," applying the doctrine to the effect of the insolvency laws of a State. See also Cowles *v.* Mercer Co., 7 Wall., 118; So. Pac. R'y Co. *v.* Denton, 146 U. S., 202.

It is sufficient to refer to the case of Cæsar *v.* Cappell, 83 F. R., 403, as to the judgment of the court upon the effect of the filing of the charter with the secretary of state and the abstract thereof on Aug. 11, 1893, subsequently to the making of the contract and prior to the passage of the curative act of May 10, 1895. We there held that a compliance with the statute prior to act of 1895 was, in itself, a sufficient filing which removed whatever infirmity

there was in the contract, and therefore it might 133
be enforced by the courts without regard to the act of 1895 subsequently passed. It was there said:

"The infirmity which existed before that time was that the courts of Tennessee, State and Federal, if you please, would not enforce a contract made in disobedience of the statute, but whenever that disobedience was removed and the parties complied with the conditions there was no longer any substantial reason why the courts should not enforce it.

Any reason that might be assigned for not enforcing it would be neither within the mischiefs to be remedied by the statute nor within the enforcement of any policy declared by it. but purely and entirely sentimental; the sentiment being that the 134
contract having been originally made in disrespect of the statute, should be forever disfavored by the courts and repelled from their precincts, until the legislature had granted a statutory pardon. We think it will be found that courts do not proceed upon any such theory unless the infirmity inheres in the vicious, immoral or criminal nature of the act itself."

This still seems to me quite a substantial answer to the defense that has been set up in this suit.

The result is that the plaintiff is entitled to a decree for the collection of its debt and the foreclosure of its mortgage, and the usual decree for that purpose will be drawn and entered. 135

Decree accordingly. (88 Fed. Rep., pp. 7-21; Transcript, pp. 100-116.)

Status and Relationship of Appellants and Appellee.

Having thus traced the judicial history of this case and incidentally shown the facts as found to exist by the Circuit Judge, who heard the case in the first instance, and by the Judges of the Circuit

136 Court of Appeals who certified the case to this court, we now invite the attention of the Court to certain specific facts appearing in the record, which show the status of the appellants and appellee and the relationship that appellant H. L. Bedford bears to the appellee as a stockholder therein, occupying, under the settled doctrines of law applicable to corporations of this particular class, a relation practically in the nature of a partnership with the other stockholders in the Eastern Building and Loan Association. Said association is a strictly mutual corporation organized and existing under the laws of the State of New York, and it dealt with the appellant H. L. Bedford in all matters shown by
137 the record in this case, purely in his capacity as a stockholder whose rights and obligations became and are fixed and determined by the Articles of Incorporation of the Eastern Building and Loan Association, its corporate by-laws, rules and regulations and the laws and judicial decisions of the State of New York. The specific facts to which we direct attention are as follows:

1. The Eastern Building and Loan Association of Syracuse, N. Y., is a corporation organized and existing under the laws of the State of New York, having its corporate situs and principal place of business in the City of Syracuse in said State, and it
138 was as a corporation and citizen of the State of New York that appellee filed its bill in this suit in the United States Circuit Court in Tennessee against the appellants, citizens of and residents in Tennessee (Transcript, p. 1, fol. 2; p. 12, fol. 15).

2. The Articles of Incorporation of the Eastern Building and Loan Association show that it is a corporation organized as a building and loan association under Chapter 122 of the Laws of 1851 of New York, entitled "An Act for the Incorporation of Building, Mutual Loan and Accumulating Fund Associations," and that its powers, duties and cor-

porate status are fixed by said Act of 1851 "and the 139
acts amendatory thereof and supplementary thereto"
(Transcript, p. 44, fol. 55).

3. Chapter 122 of the New York Laws of 1851, under which the appellee was organized, is as follows:

CHAP. 122.

AN ACT for the incorporation of building, mutual loan and accumulating fund associations.

PASSED April 10, 1851.

The People of the State of New York, represented 140
in Senate and Assembly, do enact as follows:

§ 1. Any number of persons, not less than nine, may associate and form an incorporated company for the purpose of accumulating a fund for the purchase of real estate, the erection of buildings, or the making of other improvements on lands, or to pay off incumbrances thereon, or to aid its members in acquiring real estate, making improvements thereon, and removing encumbrances therefrom; and for the further purpose of accumulating a fund to be returned to its members, who do not obtain advances as above mentioned, when the funds of such association shall amount to a certain sum per share, to be specified in the articles of association. 141

§ 2. Such persons shall severally subscribe articles of association, in which shall be set forth the name of the corporation, the time of its regular meetings, and how special meetings may be called, and what shall constitute a quorum to transact business at meetings; the qualification of members and how constituted; what officers, trustees and attorney there shall be, and how and when chosen, and their duties; and how removed or suspended from office; the entrance fee of new members and new shares, the monthly or weekly dues per share, the redemption fee on shares on which advances shall be made,

and fees to be paid on the transfer of shares; the fines and penalties for non-payment of dues or fees, or other violation of the articles of association; the manner of redemption of shares by advances made thereon, the mortgaged security to be taken on such advances, and how the same may be redeemed or changed; the manner of the transfer or withdrawal of shares; the manner of investing funds not required for advances on shares; the qualifications of voters at the meetings, and the mode of voting; the ultimate amount to be paid to the owners of unredeemed shares; the manner of altering or amending the articles of association, and such other provisions as shall be necessary for the convenient and effective transaction of the business thereof; provided, that the same shall not in any respect contravene the constitution or laws of this state.

§ 3. A true copy of such articles, signed by the officers of the association, together with a statement showing when the association was organized, and the place of the transaction of its business, and the names of the officers and trustees at the time of the making of such statement, which shall be verified by oath or affirmation before any officer authorized to take affidavits, to be used in courts of justice, shall be filed in the office of the clerk of the county in which such association shall transact its business; and thereupon the persons who have subscribed the articles of association as aforesaid, and such other persons as shall become members of such association, and their successors, shall be a body corporate by the name specified in such articles of association, and shall possess the powers and privileges, and be subject to the provisions of title third of chapter eighteen of the first part of the Revised Statutes, so far as those provisions are consistent with the provisions of this act, and they shall by their corporate name, be capable in law of purchasing, holding and conveying any real and personal estate whatever, which may be necessary to enable said company to carry on their operation named in such certificate.

§ 4. It shall be lawful for the trustees to call in 145
and demand from the stockholders, respectively, all such sums of money by them subscribed, at such times and in such payments or installments as the articles of association shall prescribe, under the penalty of forfeiting the shares of stock subscribed for, and all previous payments made thereon, if payment shall not be made by the stockholder within sixty days after a personal demand or notice requiring such payment shall have been published for six successive weeks in the newspaper nearest the place where the business of the company shall be carried on as aforesaid.

§ 5. All corporations formed under this act shall have power to borrow money for temporary pur- 146
poses not inconsistent with the objects of their organization; but no loan for such purposes shall have a longer duration than two years, nor shall such indebtedness exceed at any one time one-fourth of the aggregate amount of the shares and parts of shares, and the income thereof, actually paid in and received.

§ 6. Parents and guardians may take and hold shares in such association in behalf and for the use of their minor children or wards, provided the cost of such shares be defrayed from the personal earnings of such minor children or wards, or by gifts from persons other than their male parents; married women may take and hold shares in such associa- 147
tions, provided the cost of such shares be defrayed from their personal earnings, the personal earnings of their children voluntarily bestowed for this purpose, or from property bequeathed or given to them by persons other than their husbands.

§ 7. Every such corporation shall terminate, except for the purpose of settling its affairs, whenever all the shares thereof shall be redeemed by advances thereon, or whenever the owners of unredeemed shares shall be paid the ultimate value thereof, as provided in the articles of association, and not sooner; but no dividend of principal or of profits

shall be made until such termination, nor until all the debts of the association shall have been paid or otherwise sufficiently provided for. No holder of redeemed shares shall claim to be exempt from making the monthly payments provided in the articles of association, upon the ground that by reason of losses or otherwise the association has continued longer than was originally anticipated, whereby the payments made on such shares may amount to more than the amount originally advanced, with legal interest thereon; nor shall the imposition of fines for non-payment of dues or fees, or other violation of the articles of association, nor shall the making of any monthly payment required by the articles of association, or of any premiums for loans made to members be deemed a violation of the provisions of any statute against usury.

§ 8. Any existing association formed for the purposes mentioned in the first section of this act, may, on the vote of a majority of the voting shares, at any regular meeting after the passage of this act, become entitled to the benefit of this act, on complying with the second and third sections thereof, unless the second section has heretofore been complied with; in which case it shall be necessary to comply only with the said third section.

§ 9. No officer, trustee, attorney, agent or servant of any association hereby incorporated, shall use or dispose of any part of the funds of such association, or assign, transfer, cancel or deliver up or acknowledge satisfaction of any bond, mortgage or other written instrument belonging to such association, unless duly authorized, or be guilty of any fraud in the performance of his duties; and every person guilty of a violation of this section shall be liable civilly to the party injured, to the extent of the damage thereby incurred, and shall also be liable to an indictment for a misdemeanor, punishable by fine or imprisonment, or both, in the discretion of the court by which he shall be tried.

§ 10. Each association formed under the provi- 151
sions of this act, shall, at the close of its first year's operations, and annually at the same period in each year thereafter, publish in at least two newspapers published in the place where their business may be located, or if no newspaper shall be published in such place, then in any two newspapers published nearest such place, a concise statement verified on the oaths of its president and secretary, showing the actual financial condition of the association, and the amount of its property and liabilities, specifying the same particularly.

§ 11. All the shareholders of any association formed under this act, shall be individually liable to the creditors of said association, to an amount 152
equal to the amount of stock held by them respectively, for all debts contracted by such association. The directors or other officers of every association formed under this act, shall be personally liable for any fraudulent use, disposition or investment of any moneys or property belonging to such association, or for any loss which shall be incurred by any investment made by such directors or other officers, other than such as are mentioned in and authorized by this act; but no director or other officer of any such association, shall be liable as aforesaid, except he authorized, sanctioned, approved or made such fraudulent use, disposition or investment as aforesaid. 153

§ 12. No person holding stock in any such company, as executor, administrator, guardian or trustee, and no person holding such stock as collateral security, shall be personally subject to any liability as stockholder of such company, but the person pledging such stock shall be considered as holding the same, and shall be liable as a stockholder accordingly; and the estate and funds in the hands of such executor, administrator, guardian or trustee shall be liable in like manner, and to the same extent as the testator or intestate, or the ward or person inter-

154 ested in such trust fund would have been if he had been living and competent to act, and hold the same stock in his own name.

§ 13. Every such executor, administrator, guardian or trustee, shall represent the share of stock in his hands at all meetings of the company, and may vote accordingly as a stockholder; and every person who shall pledge his stock as aforesaid, may, nevertheless, represent the same at all such meetings, and may vote accordingly as a stockholder.

§ 14. In case it shall happen at any time, that an election of officers shall not be made on the day designated by the by-laws of said company, when it ought to have been made, the company for that
155 reason shall not be dissolved; but it shall be lawful, on any other day, to hold an election for trustees, in such manner as shall be provided for by the said by-laws; and all acts of trustees shall be valid and binding as against such company, until their successors shall be elected.

§ 15. The legislature may at any time alter, amend, or repeal this act, or may annul or repeal any incorporation formed or created under this act; but such amendment or repeal shall not, nor shall the dissolution of any such company take away or impair any remedy given against any such corporation, its stockholders or officers, for any liability which shall have been previously incurred.

156 § 16. Any company which may be formed under this act, may increase or diminish its capital stock, by complying with the provisions of this act, to any amount which may be deemed sufficient and proper for the purposes of the corporation. But before any corporation shall be entitled to diminish the amount of its capital stock, if the amount of its debts and liabilities shall exceed the amount of capital to which it is proposed to be reduced, such amount of debts and liabilities shall be satisfied and reduced so as not to exceed such diminished amount of capital.

§ 17. Whenever any company shall desire to call 157
a meeting of the stockholders, for the purpose of increasing or diminishing the amount of its capital stock, it shall be the duty of the trustees to publish a notice signed by at least a majority of them, in a newspaper in the county, if any shall be published therein, at least three successive weeks, and to deposit a written or printed copy thereof in the post-office, addressed to each stockholder at his usual place of residence, at least three weeks previous to the day fixed upon for holding such meeting, specifying the object of the meeting, the time and place when and where such meeting shall be held, and the amount to which it shall be proposed to increase or diminish the capital, and a vote of at least two- 158
thirds of all the shares of stock shall be necessary to an increase or diminution of the amount of its capital stock.

§ 18. If at any time and place specified in the notice provided for in the preceding section of this act, stockholders shall appear in person or by proxy, in numbers representing not less than two-thirds of all the shares of stock of the corporation, they shall organize, by choosing one of the trustees chairman of the meeting, and also a suitable person for secretary, and proceed to a vote of those present, in person or by proxy; and if on canvassing the votes it shall appear that a sufficient number of votes has been given in favor of increasing or diminishing the 159
amount of capital, a certificate of the proceeding, showing a compliance with the provisions of this act, the amount of capital actually paid in, the whole amount of debts and liabilities of the company, and the amount to which the capital stock shall be increased or diminished, shall be made out, signed and verified by the affidavit of the chairman, and be countersigned by the secretary; and such certificate shall be acknowledged by the chairman, and filed as required by the first section of this act; and when so filed, the capital stock of such corporation shall be

160 increased or diminished to the amount specified in such certificate.

§ 19. The shares held by the members of all associations incorporated under the provisions of this act, shall be exempt from sale on execution for debt, to an extent not exceeding six hundred dollars in such shares, at their par value.

§ 20. No loan made by any such association to any of its members may exceed in amount the par value of the capital stock for which such member may have subscribed.

§ 21. The copy of any certificate of incorporation, filed in pursuance of this act, certified by the county clerk or his deputy, to be a true copy, and of the
161 whole of such certificate, shall be received in all courts and places, as presumptive legal evidence of the facts therein stated.

4. The above quoted Act of 1851 is still in full force and effect in the State of New York so far as appellee and its members are concerned, except that some minor amendments of no importance, so far as this case is concerned, were made to the Act of 1851 by Chapter 564 of the Laws of New York of 1875 (Laws of New York 1875, Ch., 564).

5. The Articles of Incorporation of the appellee provide, among other things, the following;

162 "II.—This association is formed for the purpose of purchasing real estate; for the erection of buildings or other improvements, and the improvement of lands; for aiding members in acquiring or improving real estate, or of removing encumbrances thereon by means of advances; for accumulating a fund for the benefit of members who do not obtain advances; and for the purpose of conducting the general business of a building and loan association, and providing the advantages usually expected from savings banks and other institutions of like character.

"III.—The principal place of business of this association shall be located at Syracuse, N. Y., but branches or agencies may be established and business done in any part of the State of New York or in any State or Territory of the United States as the board of directors may direct." 163

"V.—The qualification of members shall be as follows: Any person upwards of twenty-one years of age, or parents or guardians of children, may become members of this association, and shall become such upon subscribing for two or more shares of stock in this association as prescribed by the by-laws thereof.

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"VI.—The management of all the business of the association shall be vested in a board of nine directors, who shall be chosen at each regular meeting. Said board shall have full power and authority to fill all vacancies and make such by-laws, rules and regulations for the general management and conduct of the business of this association as they may deem necessary."

"IX.—The entrance fee of new members and new shares shall be one dollar ($1.00) per share of stock in said association. The monthly dues per share shall be seventy-five cents ($0.75). There shall be a transfer fee of two dollars ($2.00) on each and every certificate of shares transferred. The fines for non-payment of dues shall be ten cents ($0.10) on each and every share of stock unpledged and twenty cents ($0.20) on all stock pledged for each and every month the payment may be in arrears. In case a monthly payment on any share shall become past due and payable for a period of six months or more such share shall be sold for the purpose of paying the arrearages. The proceeds of the sale shall first be used to pay all back monthly payments and fines and the balance remaining after paying all accrued 165

166 fines and monthly payments shall be paid to the member in whose name the stock stands at the time of sale. If the stock brings no more than enough to pay the accrued fines and monthly payments, it shall be bid in by the association and canceled, and the amounts standing to the credit thereof in the loan fund shall be divided among the other shares as profits.

"X.—The advances or loans made to any member of this association shall not exceed the face value of the stock owned by him, and except as hereinafter stated shall be upon satisfactory first mortgages, real-estate security, and be under such rules and
167 regulations as the by-laws and the board of directors may require. Loans may be made upon shares in good standing, and in force one year to an amount not exceeding 90 per cent. of the monthly dues paid to the association upon such shares as collateral security, and upon such notes, bond or other obligation or instrument as the board of directors and by-laws may require A uniform premium of 10 per cent. shall be paid and allowed by the borrower upon each loan; and upon all loans the borrower shall pay interest at the rate of 5 per cent. per annum and a premium of 5 per cent. per annum as a redemption fee and the same shall be paid on the last Saturday of each month during the continuance of said
168 loan at the principal office of the association. In case the monthly installments or loans are not paid as aforesaid, then interest at the rate of 6 per cent. per annum payable semi-annually shall be collected thereon; and in case default shall be made in the payment of the regular monthly installments, fees or dues, the association may compel payment of principal, interest and premiums, assessments, fees or dues by proceeding upon the note, or other obligation and mortgage, which shall at once become fully due and payable, and the association may cancel and treat as forfeited the shareholder's shares of

stock, whether deposited as collateral security or 169
not, and all payments previously made thereon, shall be forfeited to the association. Pledged shares may be transferred upon consent of the association by transferring the mortgage security upon payment of the fee therefor, provided all assessments, installments, dues and charges thereon are paid to date, and subject to such other regulations, if any, as the by-laws may provide. Any shareholder may have his mortgage transferred or changed from one piece of property to another by giving thirty days' notice in writing, the shareholder to pay all expenses incurred by the transfer of the same. Loans may be prepaid and the mortgaged property released upon application to the association, and giv- 170
ing thirty days' notice in writing of the intention. An equitable discount shall be allowed therefor to be determined by the board of directors (Transcript, p. 45, and pp. 46, 47).

(It will be noted that appellee was incorporated in February, 1890 (Transcript, pp. 49, 50).)

6. The Eastern Building and Loan Association, pursuant to the law under which it was organized, at the time of its organization formally adopted a set of by-laws (Transcript, p. 50, fol. 62) and these by-laws were duly given in evidence and appear in the record in this case (Transcript, pp. 55–63).

In this connection it will be noticed that these 171
by-laws were set out in full upon the back of the certificate of stock issued to the appellant H. L. Bedford, which certificate constituted him a member of the Eastern Building and Loan Association.

(Deposition of D. A. Pierce, Transcript, p. 27, Int. 6; and Exhibit C thereto, Transcript, pp. 53–63).

7. Appellant H. L. Bedford made application and subscribed for stock in the Eastern Building and Loan Association on the 2d day of January, 1891,

172 and in his application recited: "I hereby agree to abide by all the terms conditions and by-laws contained or referred to in the certificate of shares, and will also comply with all the rules and regulations of said association."

(Evidence of D. A. Pierce, Transcript, p. 26, Int. 4; Exhibit B, Transcript, p. 51, fol. 64.)

It appears that this application for stock was received by the appellee at its Home Office in New York before January 26th, 1891, and that a stock certificate for forty six (46) shares, numbered 4773, was shortly thereafter issued to appellant H. L. Bed-
173 ford (Transcript, p. 51, fol. 64, and p. 53).

Appellants were, at the time of said application for membership in appellee and the issue of stock certificate to appellant H. L. Bedford, as aforesaid, citizens, residents and inhabitants of the State of Tennessee (Transcript, p. 12, fol. 15; p. 51, fol. 65; p. 53, fol. 66).

8. Appellant H. L. Bedford, after his application for membership in appellee on January 2nd, 1891, and after the receipt of his certificate of stock issued to him under date of February 2, 1891 (Transcript, pp. 51, 55), made regular monthly payments of dues or calls upon said stock, in accordance with the Ar-
174 ticles of Incorporation and by-laws of the appellee for about three months thereafter, and then, on or about *March 20, 1891*, he made and signed a formal application for an advance or loan to him as a stockholder in appellee of the par or maturity value of his shares (Transcript, p. 63, fol. 79; p. 66, fol. 82.)

9. Appellee H. L. Bedford, in making his application for stock transmitted such application to appellee at its Home Office in Syracuse, N. Y., through J. H. T. Martin and H. B. Martin, local solicitors for the Association, having the right to receive ap-

plications for membership in appellee, the same to 175
be forwarded to the Home Office of the Association in Syracuse for acceptance.

(Deposition of D. A. Pierce, Transcript, p. 32, int. 20, and ans. thereto.)

These soliciting agents were working purely upon a commission basis and had no authority to bind the Association in any way, and no authority to make loans or advances to members or enter into any agreements in relation thereto.

(Deposition of D. A. Pierce, Transcript, p. 32, int. 20 and ans. thereto.)

Their powers were limited to taking applications 176
for stock or for advances to members and forwarding them to the Home Office of the corporation at Syracuse, N. Y., for acceptance or rejection there by the proper officers and directors of the corporation.

(Deposition of D. A. Pierce, Transcript, p. 32, int. 20 and ans. thereto.)

(By-Laws, Art. 15, §§ 1, 2; Transcript, p. 62.)

10. The stock certificate of the appellant H. L. Bedford, although bearing date February 2, 1891, was in fact issued to him on January 26, 1891, the reason for its being dated ahead being to make it a 177
part of a certain series of stock, and the explanation of this matter appears in the transcript.

(Deposition of D. A. Pierce, Transcript, pp. 26, 27, int. 6 and ans. thereto.)

11. The application for an advance or loan upon the Bedford stock was made, as has been already stated, on March 20, 1891, but, under the rules and regulations of the appellee, an appraisement of the property offered as security was required to accompany the application. This appraisement in the Bed-

178 ford matter does not appear to have taken place until the 5th day of May, 1891.

(Transcript, pp. 66, 67, fol. 83; pp. 39, 40, fol. 49; Deposition of D. A. Pierce, cross-int. 14 and ans.)

12. The application for an advance by appellant Bedford after the appraisal had been made, was forwarded to the Home Office of the appellee at Syracuse, N. Y., for action and acceptance or rejection by it. It was forwarded through the soliciting agents of the Association at Memphis, Tennessee, but they did not then, nor did they at any time undertake to contract with the appellant in reference
179 to the loan or advance, their duties being limited to the taking of the application and the forwarding of the same to Syracuse for action.

(Transcript, pp. 32, 33, fols. 40, 41; Deposition of D. A. Pierce, int. 20 and ans. thereto.)

(Transcript, pp. 35, 36, fol. 44; Deposition D. A. Pierce, cross-int. 4, 5.)

(Transcript, pp. 39, 40; Deposition D. A. Pierce, cross-int. 14 and ans. thereto.)

13. The application of appellant H. L. Bedford for an advance or loan was submitted to the Board of
180 Directors of the appellee at Syracuse, N. Y., on May 18, 1891, and the application approved and the advance or loan granted, as appears from the minutes of a directors' meeting.

(Transcript, pp. 41, 42; Deposition of D. A. Pierce, cross-int. 16 and ans. thereto.)

(Transcript, p. 70, fol. 88; Exhibit H to Deposition of D. A. Pierce.)

14. After being advised that his application for a loan or advance had been approved and the advance

granted by the appellee, appellant Bedford wrote a 181
letter to appellee, which he accompanied by an affidavit. In his letter he specifically requested that the advance be granted, and added, "I hereby agree to comply with the charter and by-laws of your Association and all requirements defined by your committee of the Board of Directors." The date of this letter is not shown, but the affidavit accompanying it was subscribed and sworn to June 20, 1891.

(Transcript, pp. 27, 28; Deposition of D. A. Pierce, int. 9 and ans. thereto; also Transcript, pp. 67, 68, fol. 84.)

15. The loan or advance upon his application 182
having been granted to appellant Bedford by action of the Board of Directors of the appellee taken at Syracuse, N. Y., on May 18, 1891, his request in the letter and affidavit of June 20, that the money be advanced to him, was thereupon complied with by the appellee and the advance or loan was made to him. It appears, however, that the money was not actually sent to him until about the 8th day of July, 1891, the reason for the delay in the actual transmission of the money being, as appears from the deposition of Mr. Pierce, "that no moneys were ever paid on loans until the papers in the case were executed, the mortgage placed of record and the title shown to be all right and free and clear of all liens other than those, if any, which were to be 183
taken up and canceled from the proceeds of the loan."

(Transcript, p. 28; Deposition of D. A. Pierce, int. 10 and ans. thereto.

(Transcript, p. 29; Deposition of D. A. Pierce, int. 15 and ans. thereto.)

While, for the reason just stated, the money was not actually paid over to appellant H. L. Bedford until July, 1891, yet, it nevertheless appears "that as soon as the loan was granted the requested

184 moneys were set apart by the Association to meet the same."

(Transcript, pp. 29, 30; Deposition of D. A. Pierce, int. 15 and ans. thereto.)

16. It appears that the money upon this loan or advance was paid to appellant Bedford by a draft of the appellee upon the Trust and Deposit Company of Onondaga, New York, dated July 8, 1891, payable to the order of H. L. Bedford; that said draft was sent to him through H. B. Martin, one of the soliciting agents of the appellee at Memphis, Tennessee; that he accepted the draft, endorsed and collected it.

185 (Transcript, pp. 29, 30; Deposition of D. A. Pierce, int. 15 and ans. thereto.)

17. While the money upon the loan or advance to him was not paid over, through the delivery of the draft aforesaid, until early in July, 1891, yet it appears that the mortgage given by the appellants to secure the loan or advance made to them was dated May 1, 1891, was acknowledged the 18th day of June, 1891, and was filed for registration in the Register's office of Shelby County, Tennessee, on June 20, 1891 (Transcript, pp. 22, 24, 25, fols. 30, 31), the entire transaction being treated in the mortgage and the notes secured by the same as having been consummated in May, 1891, the first note executed
186 by Bedford falling due on the last Saturday of May, 1891, and a similar note each succeeding month thereafter during the time the loan was estimated to run.

(Transcript, p. 36; Deposition of D. A. Pierce, cross-int. 7 and ans. thereto.)

18. The appellant H. L. Bedford assigned his stock certificate to the appellee by way of collateral and in accordance with the usual custom of the appellee.

(Transcript, p. 30; Deposition of D. A. Pierce; same deposition, Transcript, p. 33, fol. 42, ans. to int. 20.)

19. All of the papers, including the mortgage and notes, were prepared by the general attorney of the appellee, at the home office of the company in Syracuse, N. Y., and forwarded to the local attorney representing the appellee at Memphis, Tennessee, for execution. 187

(Transcript, pp. 28, 29; Deposition of D. A. Pierce, int. 11 and ans. thereto.)

20. The notes of the appellant H. L. Bedford to the appellee were all made payable to the order of the appellee at its home office in Syracuse, N. Y. The understanding at the time the notes were executed and accepted was that they were to be paid at the place designated as the place of payment. There never was any agreement or understanding to the contrary, although it appears that the practice for a time in the actual payment of the notes was for the appellant Bedford to make payment of the amount due thereon by check or otherwise through the soliciting agent of the appellee at Memphis, who would transmit the money or check given him with which to pay the note, and subsequently turn over the note, when received from the appellee, to the appellant. 188

(Transcript, pp. 71–77.)

(Transcript, p. 33, Deposition of D. A. Pierce.)

(Transcript, p. 37, Deposition of D. A. Pierce, cross-int. 7 and ans. thereto.) 189

(Transcript, pp. 40, 41; Deposition D. A. Pierce, cross-int. 15 and ans. thereto.)

While the payments of some of the notes were made by appellant H. L. Bedford through Martin, one of the soliciting agents of the appellee at Memphis, yet it appears that in this matter Martin was acting rather as the agent of the appellant Bedford than as the agent of the appellee, because he was, at the time the loan in question was made to Bedford

190 and at the time the certificate of shares was issued to him and for some time thereafter, the local secretary and treasurer of the Memphis Local Board of the appellee. That Local Board was expressly understood to represent and act for the members of appellee at Memphis, and was in fact a local organization for their own benefit and the protection of the interests of such members, and the treasurer of the Local Board was, by express understanding and agreement, the agent for the members at Memphis who made payments to him, and he did not act as agent for the Association in receiving such payments.

(Transcript, p. 33, Deposition of D. A. Pierce, int. 20 and ans. thereto.)

191 (Transcript, pp. 69, 70, Exhibit G to Deposition of D. A. Pierce.)

21. It was to J. H. T. Martin, as treasurer of the Local Board, that for a time payments of notes or of the moneys with which to pay the notes, was made by the appellant Bedford. For a few months after the loan to Bedford was consummated, appellee sent the notes to Martin in advance of their actual payment, but "after December, 1891, however, no notes were ever forwarded until the moneys thereon had actually been received" at the home office of the association in Syracuse, and later payments were made
192 through the Memphis banks direct to the appellee at Syracuse.

(Transcript, p. 33, fol. 41, Deposition of D. A. Pierce, int. 20 and ans. thereto.)

The specific facts regarding the payment of the first twenty-five notes, which were all that were ever paid by the appellants, are shown in the deposition of D. A. Pierce.

(Transcript, pp. 36, 37, Deposition of D. A. Pierce, cross-int. 7 and ans. thereto.)

22. The appellant Bedford made payments of dues upon his stocks for a period of 28 months down to and including May, 1893, and also made payments of all the notes executed by him maturing up to that date. On that date and thenceforward he defaulted in the payments due from him to the Association, and the true status of his account is shown in the transcript by the deposition of W. H. Emery. 193

(Transcript, pp. 78-80, Deposition of W. H. Emery.)

23. It appears that the appellant Bedford is an educated man, trained first as a civil engineer and afterwards as a lawyer. 194

(Transcript, pp. 93, 94, Deposition of H. L. Bedford, cross-examination.)

24. It was stipulated by the parties that the appellee filed a copy of its charter with the Secretary of State of Tennessee, on the 11th day of August, 1893, and filed an abstract of same in the office of the Register of Shelby County, Tennessee, on August 15, 1893, but that nothing else was done by it towards complying with the Act of March 26, 1891, or any of the acts; and it was further stipulated that at the times referred to, J. W. Buchanan, an attorney practicing at the Memphis bar, was the local attorney and legal adviser of the appellee, and that when the Tennessee Act of March 26, 1891, was passed, he advised appellee not to sell any more stock in the State until compliance with that act, but he further advised that it had a right to make loans on stock already sold in accordance with the rights given to every shareholder under his certificate. 195

(Transcript, pp. 91, 92, Stipulation.)

25. It was also stipulated that during the period covered by the transactions between the appellee and the appellants, the appellee made some loans to stockholders in Tennessee outside of Shelby County,

196 and that the methods pursued in regard to these loans were similar to those followed in the transaction with appellants.

(Transcript, p. 92, Stipulation.)

26. It appears that after appellant H. L. Bedford had subscribed for stock in appellee, and the stock had actually been issued to him, and after he had made his application to appellee for a loan or advance upon said stock, the Legislature of Tennessee, on March 26, 1891, passed the two acts set forth in the certificate herein from the Circuit Court of Appeals and appearing in the record in this case in full.

(Transcript, pp. 130–132; *ante*, pp. 15–19,
197 fols. 44–55.)

27. Appellants having failed to meet their obligations to appellee under the terms of the subscription for stock by the appellant H. L. Bedford, and the application for a loan or advance and the notes executed by H. L. Bedford and the mortgage executed by the appellants, appellee, on June 24, 1895, filed its original bill in this cause as the complainant in the Circuit Court, seeking to foreclose said mortgage and to collect the balance of indebtedness due from the appellants to the appellee under the terms and conditions of the mortgage aforesaid and the articles of incorporation and by-laws of the appellee. Ap-
198 pellants answered said bill, and in their answer set up, among other things, the following grounds of defence:

FIRST.—That the appellee, being a foreign corporation, was, in the transactions above set forth, doing business in Tennessee in violation of the statutes above referred to and without compliance therewith, and, therefore, that the mortgage aforesaid and the transactions between the appellee and the appellant Bedford were illegal and void and the notes, mortgages and contracts unenforceable in the State of Tennessee.

SECOND.—The appellants denied that appellee was 199
a building and loan association and contended that because it was not a building and loan association, within the contemplation of the laws of Tennessee, and had not made its loan or advance in accordance with the Tennessee laws regulating such associations, and had not complied with the statutes aforesaid, therefore the contract for the loan or advance was usurious.

It was not denied that the appellants had executed the mortgage to the appellee, nor was it denied that the notes, application for stock, application for loan, &c., had all been executed by appellant H. L. Bedford, as alleged in the bill of complaint and as shown in the foregoing record, the 200
contentions of the appellants as to their non-liability being entirely technical and resting substantially upon the propositions already stated.

Upon this state of the record, on the hearing in the Circuit Court, a decree was rendered in favor of the complainant for $5,075.37, with interest from the date of the decree and with the costs of suit. The same was declared to be a lien upon the land and premises conveyed by the mortgage described in the bill, and a foreclosure of the mortgage was decreed.

It was from this decree that the appellants took an appeal to the Circuit Court of Appeals for the Sixth Circuit, and upon the hearing in that court 201
the case was certified to this court as above set forth.

(Transcript, pp. 98-100, Decree.)

SUMMARY OF FACTS.—It will be seen from the foregoing abstract of the facts shown by the record in this case, that the statement of facts certified to this Court by the Judges of the Circuit Court of Appeals for the Sixth Circuit is in all material respects full, accurate and complete, and amply serves to present to this court the true controversies between the parties, arising upon the face of the

202 record. If there be any defect or omission in the statement of facts certified up by the Judges of the Circuit Court of Appeals, it is in the failure to point out the exact status and relationship of the appellant H. L. Bedford to the appellee as a stockholder and member at the time he made application to appellee for a loan or advance and executed to it his several promissory notes above referred to and his mortgage to secure the same. We have in this statement of the case fully covered this point.

APPELLANT'S ASSIGNMENT OF ERRORS.

The questions which counsel for the appellants in the Circuit Court of Appeals regarded as presented
203 by the record are shown by their assignment of errors, which assignment was as follows, to wit:

Assignments of error by and on behalf of H. L. Bedford and L. M. Bedford, defendants and appellants.

The said above-named defendants and appellants, H. L. Bedford and L. M. Bedford, come and assign the following as errors in the rendition of the decree of June 4th, 1898:

1st. The court erred in rendering a decree against the defendants and each of them for any sum whatever.

2d. The court erred in rendering a decree against
204 the defendants and each of them for any sum for costs of this cause and for making the same a charge against the property or its proceeds.

3d. The court erred in not holding that the Eastern Building & Loan Association of Syracuse, N. Y., had not complied with the acts of the legislature of the State of Tennessee, viz.: Act of March 19th, 1877, chapter 31 of Acts of 1877, act of March 10, 1891, chapter 95 of Acts of 1891, act of March 21, 1891, chapter 122 of Acts of 1891, when the contract was made, and in not holding that such contract was void and unenforceable. The court should have held that such contract was void or unenforceable.

4th. The court erred in not holding that the East- 205
ern Building & Loan Association of Syracuse, New York, had never complied with the act of the legislature of the State of Tennessee of March 26, 1891, being chapter 2 of said Acts of 1891, and in not holding that the contract was void and unenforceable. The court should have held that such contract was void or unenforceable.

5th. The court erred in holding that the contract sued on was a New York contract and not a Tennessee contract. The court should have held that the contract was a Tennessee contract and not a New York contract.

6th. If the contract sued on be considered as a New York contract then the court erred in holding 206
it was valid and enforceable. The court should have held, even if it was a New York contract, that it was made by plaintiff in evasion of the Tennessee statutes set forth at Nos. 3 and 4 of this assignment of errors and was void or unenforceable in any court sitting in Tennessee, State or Federal.

7th. The court erred in holding that the statutes of the State of Tennessee referred to in Nos. 3 and 4 of this assignment of errors, if they applied to the contract in question, were in conflict with the Constitution of the United States or any part thereof. The court should have held that no such conflict existed and that the statutes referred to were valid and covered the transactions in question, and that 207
the contract was void or unenforceable.

8th. The Court erred in not holding that the act of the Legislature of the State of Tennessee of 1887, being chapter 226 of said Acts of 1887, defined what was doing business in the State of Tennessee by foreign corporations, and in not holding that plaintiff, in its transactions in question, was doing business in Tennessee in the sense of said statute without complying with the laws of Tennessee, and that its contract was void or unenforceable.

9th The Court erred in not holding that the plaintiff was and is a New York corporation, and that the law of the State of New York required corporations

208 of other States than New York having transactions with persons in that State to comply with the regulations of the New York statutes on such subjects, and where such compliance was not had, that contracts made were either void or unenforceable in New York. Such being the fact, the Court should have held similar requirements as to New York corporations existed in Tennessee, and that the contract was void or unenforceable.

10th. If the contract was not wholly void and was enforceable to any extent in Tennessee, then the Court was in error in not holding that the same was usurious. The Court should have held that the charging of a fixed premium for the loan made it
209 usurious to that extent, and should have further held that when Bedford was made to withdraw his shares in the plaintiff company that he lost all interest in any profits of the company and agreed to pay a fixed amount in a fixed time, and that thereby the said transaction became usurious and all usury should be eliminated and he be credited on the claim with the full amounts paid by him. The Court should have held that this was the law of the State of Tennessee as well as the law of the State of New York, and that if it were not the law of New York that it was the law of the State of Tennessee, applicable in this case, and that plaintiff, as a foreign corporation, had only the rights which a Tennessee
210 corporation would have.

11th. The Court erred in holding that defendants and appellants were estopped to plead the invalidity of the contracts sued on.

This assignment of errors, with some modifications, is repeated in the brief filed for appellants in this Court (Appellants' Brief, pp. 15-17).

To the questions presented by this assignment of errors and to those stated in the certificate of the Judges of the Circuit Court of Appeals for the Sixth Circuit, we address ourselves in the following *Brief and Argument:*

BRIEF.

I.

The appellee is a building and loan association organized upon a purely mutual basis under the laws of New York, and its members, as has been well said in many cases, are essentially partners in a common enterprise, in the burdens and benefits of which they must mutually share.

Ch. 122, Laws of N. Y. of 1851, *ante* p. 47.

Tindall, *C. J.*, in Silver *v.* Barnes, 6 Bing. N. C., 180; 8 Scott, 300; 37 Eng. Com. L. Rep., 335.

Burbridge *v.* Cotton, 5 De G. & Sm., 17; 21 L. J. Ch., 201; 8 Eng. L. & Eq., 57.

Seagrave *v.* Pope, 1 De G., M. & G., 783; 22 L. J., Ch., 258; 15 Eng. L. & Eq., 477.

Cutbill *v.* Kingdom, 17 L. J., Eq., 177; 1 Exch., 494.

In re Durham Co. (Davis Case, Wilson's Case), Law Rep., 12 Eq., 516; 25 L. T. N. S., 83.

Robertson *v.* Homestead Assn., 10 Md., 397; 69 Am. Dec., 145.

Patterson *v.* Workingmen's B. & L. Assn., 14 Lea (Tenn.), 677.

Engelhardt *v.* Fifth Ward Assn., 148 N. Y., 281.

People *v.* Lowe, 117 N. Y., 175, 180.

Tilley *v.* Am. B. & L. Assn., 52 Fed. Rep., 618, 622.

Thompson on Building Associations (2nd Ed.), §§ 3, 4.

"A mutual savings fund and loan association is purely a co-operative society, consisting of a part-

nership in the profits of money as a money maker, equitably distributed in proportion to the severalties of capital furnished by the individual members thereof."

Wrigley on Building Associations, p. 16.

The Greenwich Union Building Society, the first English society regularly established, was founded by a deed of rules and regulations, dated the 7th of January, 1809. The membership of that society was by its articles limited to fifty members. The maturity value of the shares was fixed at 210 pounds, and it was provided that the payments of members should continue "until the final close of the society by each member having paid his 210 pounds on every share held by him."

Davis on Building, &c., Societies (3d Ed.), pp. 1-3.

The legality of the organization of this first formally authorized building and loan association was considered and established in the early case of *Pratt* v. *Hutchinson*, 15 East., 511, and the system of building and loan associations since established upon similar plans is now world wide.

From the time of the legal organization of the Greenwich Union Building Society, there has been steady growth and progress among societies of like character, and in England, Australia, the United States and all English-speaking countries, their growth has been phenomenal, and when properly organized and protected by proper legislation and equitable decisions of the courts, building associations have been more uniformly successful and profitable to their members than any other form of co-operative investment societies. From recent statistics, it appears that "there are more than 3,500 associations on the Island of Great Britain and the Continent of Australia, with assets of more than $300,000,000, and we have in the United States more than 6,000 associations with not less than $700,-

000,000 of assets, making a grand total of 10,000 associations with more than $1,000,000,000 in assets in these two English speaking countries alone."

Quoted from Report of Bird M. Robinson, Secretary, made to the Inter-State League of Building and Loan Associations, Nov. 24, 1896.

The Hon. Carroll D. Wright, in his ninth annual report as Commissioner of Labor, reports upon the building and loan associations of the United States. That report was made in 1893, and was based upon most careful and thorough research. In the introduction to the report and in chapter 1 of the report, which summarizes the general tables, much valuable information will be found upon the general subject of building and loan associations in the United States, their business methods and principles of operation, and an examination of these two chapters will, no doubt, serve to remove many erroneous impressions which are currently prevalent, and which, we regret to say, have tinctured the decisions of the courts in numerous cases. Mr. Wright, describing a building and loan association, says: "It is seen, therefore, that every member of a building and loan association must be a stockholder; but the difference between a stockholder in such an association and that in an ordinary corporation for usual business purposes lies in the fact that in the latter the member or stockholder buys his stock and pays for it at once, and usually is not called upon for any further payments. * * * In the building and loan association, on the contrary, the stockholder or member pays a stipulated sum, say, $1, when he takes his membership and buys a share of stock. He then continues to pay a like sum each month until the aggregate of sums paid, augmented by the profits, amounts to the maturing value of the stock, usually $200, and at this time the stockholder is entitled to the full maturing value of the share, and surrenders the same. It is seen clearly,

then, that the capital of a building and loan association consists of the combined savings of its members, paid to the association upon shares of stock, increased by the interest and premium which the association has received from loans made by it from the savings of its members thus paid to the association, and from all other sources of income. The amount of the capital of the association, therefore, increases from month to month and year to year."

9th Annual Report, U. S. Commissioner of Labor (1893), p. 12.

Speaking of the alleged distinction between so-called local and national associations, Mr. Wright says: "The terms 'local' and 'national' have been used. A local building and loan association and a national building and loan association conduct their business under substantially the same method. The local association, however, confines its operations to a small community, usually to the county in which located, while the national operates on a large scale, extending its business enterprise far beyond the borders of its own State, even. * * * At the present time the prejudice which has existed for many years against nationals is being overcome, and they are conducting their business, as a rule, with the same integrity that the locals display in the conduct of their affairs."

Ninth Annual Report, U. S. Commissioner of Labor (1893), p. 16.

There is no material distinction between the general plan of the Eastern Building and Loan Association and the English Building Societies. An English work upon building societies thus describes the associations as they now exist in that country: "A permanent society means a society which has not, by its rules, any fixed date or specified result at which it shall terminate. These are decidedly the best of all societies, as they contain more of the ele-

ments of certainty and equity, if the rules are properly drawn and observed. Shares are issued upon which the various members make payments, either in one sum, when the share is said to be 'paid up,' or by periodical or other sums, the interest in either case being allowed to accumulate until the share has reached the full value prescribed by the rules, or else paid out yearly to the member as he may prefer. Advances are made to members, repayable by small periodical instalments extending over a fixed term of years; and the rules generally allow the borrower to choose any term from three to twenty years, over which the repayment may be spread equally. Practically, most of the best societies discharge the functions of land mortgage banks. On the one hand, they receive money in such a variety of ways as to meet the requirements of all classes of investors, and at a rate of interest higher than that of the ordinary savings bank; on the other hand, they lend the money out on mortgages, obtaining a higher rate of interest, it is true, than ordinary mortgagees, but granting facilities for repayment which private mortgagees could not afford."

Davis on Building, etc., Societies (3rd Ed.), Ch. 2, § 3, p. 69.

The nature and objects of a building and loan association are well shown by the following descriptive definition: "The building association as now existing is a private corporation designed for the accumulation, by the members, of their money, by periodical payments into its treasury, to be invested from time to time in loans to the members upon real estate for home purposes, the borrowing members paying interest, and a preference in securing loans over other members, and continuing their fixed periodical instalments in addition, all of which payments, together with the non-borrower's payments, including fines for failure to pay such fixed instalments, forfeitures for such continued failure of such

payments, fees for transferring stock, membership fees required upon the entrance of the member into the society, and such other revenues, go into the common fund until such time as that the instalment payments and profits aggregate the face value of all the shares in the association, when the assets, after the payment of the expenses and losses, are prorated among all the members, which, in legal effect, cancels the borrower's debt, and gives the non-borrower the amount of his stock."

Thompson on Building Associations (2nd Ed.), § 3.

This being the first case that has come before this Court calling for a determination of the status and rights of members of a building and loan association *engaged in the transaction of an interstate business*, and commonly known as a "National" Association, and, indeed, being the first case wherein the rights of building and loan associations and their members have been before this Court for determination, we have deemed it proper to preface the examination of the particular questions involved in the case at bar with the foregoing authorities, showing the nature and corporate characteristics of the Eastern Building and Loan Association and the status of the appellant H. L. Bedford as a shareholder therein. Indeed, until the character of the corporation is apprehended and the relations of appellants to it are understood, the very important questions arising upon the face of the record in this case, including the grave constitutional questions submitted to this Court by the Judges of the Circuit Court of Appeals for the Sixth Circuit, cannot be properly apprehended or intelligently determined.

II.

The appellee is in all essential characteristics just such an association as those to which the foregoing authorities refer and which they describe. It is a corporation of a class which has met with approval in the courts of many States, and the contracts of appellee and like associations with individual shareholders, borrowing and non-borrowing, have been the subject of judicial consideration in numerous cases in the courts of New York.

"However it may be elsewhere, Philadelphia has become emphatically a city of comfortable homes for the poor by means of these organizations."

Sharswood, *J.*, in

Becket *v.* Uniontown B. & L. Assn., 88 Pa. St., 211, 216.

And in the courts of New York the contracts of such associations with their members have been almost uniformly sustained, and the rights and privileges of both the associations and the members in that State are well settled.

Concordia, &c., Assn. *v.* Read, 93 N. Y., 474.

People *v.* Lowe, 117 N. Y., 175.

People *ex rel.* Fairchild *v.* Preston, 140 N. Y., 549.

O'Malley *v.* People's Assn., 92 Hun (N. Y.), 572.

Heslin *v.* Eastern B. & L. Assn., 28 Misc. (N. Y.), 376.

Eagle Savings & Loan Co. *v.* Samuels, 43 App. Div. (N. Y.), 386.

People *v.* Bankers' Loan, etc., Co., 13 Misc. (N. Y.), 221.

House *v.* Eastern B. & L. Assn., 52 App. Div. (N. Y.), 163.

These views of the contract rights of appellee and like associations have been accepted by the Courts

of other States, and in a very recent case to which the appellee was a party, by the Supreme Court of Tennessee.

Miller *v.* Eastern B. & L. Assn. (Tenn.), 53 S. W. Rep., 231.

III.

There cannot be the slightest doubt that the plan and method of operation of appellee are in strict accordance with the laws of New York and that its contracts with its shareholders, both "advanced" and "non-advanced" are to be construed in accordance with its articles of incorporation, by-laws and the laws of New York.

Miller *v.* Eastern B. & L. Assn. (Tenn.), 53 S. W. Rep., 231.

House *v.* Eastern B. & L. Assn., 52 App. Div. (N. Y.), 163.

O'Malley *v.* People's B. & S. Assn., 92 Hun (N. Y.), 572.

Eagle S. & L. Co. *v.* Samuels, 43 App. Div. (N. Y.), 386.

Western Mass. Fire Ins. Co. *v.* Hilton, 42 App. Div. (N. Y.), 52.

"The contract between the plaintiff and the defendant is to be ascertained from the certificates issued to the plaintiff, the by-laws of the defendant and the statutes of this State for the organization and operation of building and loan associations."

Gaynor, *J.*, in Heslin *v.* Eastern Building & Loan Assn., 28 Misc. (N. Y.), 376, 378.

Concordia Assn. *v.* Read, 93 N. Y., 474.

IV.

Nor can it be successfully denied that appellant H. L. Bedford, although a citizen and resident of Tennessee, now and at the time he became a member of the appellee association, is, as to his contract of membership in appellee and his obligations assumed in connection therewith as an "advanced" or borrowing shareholder, bound by the articles of association and by-laws of appellee, and by the construction given to such articles and by-laws by the courts of New York.

Canada So. R. Co. *v.* Gebhard, 109 U. S., 527, 537.

Relfe *v.* Rundle, 103 U. S., 222, 225, 226.

Chicago, &c. Co. *v.* Wiggins Ferry Co., 119 U. S., 615, 622.

Clark *v.* Mutual Reserve Fund Life Assn. (D. C.), 43 L. R. A., 390, 395.

Sulz *v.* Mut. Reserve Fund Life Assn., 145 N. Y., 563, 568.

Ware *v.* Bankers' Loan, &c., Co., 95 Va., 680; s. c., 64 Am. St. Rep., 826.

Smith *v.* Taggart, 87 Fed. Rep., 94, 96, 97.

Engelhardt *v.* Fifth Ward Loan Assn., 148 N. Y., 281, 285.

3 Thompson on Corp., § 3046.

5 Thompson on Corp., § 5987.

Shaw *v.* Quincy Mining Co., 145 U. S., 444, 449, 450, 451, 452.

Hawkins *v.* Glenn, 131 U. S., 319, 331, 332.

Glenn *v.* Liggett, 135 U. S., 533, 544.

V.

But the contention of appellants upon this point is, that appellee was, in the making of the "advance" upon his shares to Bedford, "doing business" in Tennessee in violation of the laws of that State, not having complied with the acts of Tennessee regulating the right of foreign corporations and especially of foreign building and loan associations to do business in that State, and that, therefore, the obligations assumed by Bedford as a stockholder in appellee, the notes executed by him to appellee and the mortgage given upon real estate in Tennessee to secure such obligations and notes are illegal contracts, void and against public policy in that State, and therefore non-enforcible, not only in the State courts but in the Federal courts as well.

We meet this contention with the following propositions of law and fact namely:

I.—Contract Obligations: Vested Rights Under: Subsequent Legislation. Bedford's contract of membership, stock certificate, obligation to make payments of "dues" upon his stock and right as a member of appellee to receive an "advance" of the par or maturity value of his shares, all antedated the acts of the Legislature of Tennessee of March 26 and March 28, 1891, upon which he now relies to help him escape from his contract to pay to appellee dues upon his stock and interest and premiums upon the amount of the advance to him (*ante*, pp. 57–59, fols. 171–177)

We concede the rule to be that a State corporation, not engaged in interstate commerce, cannot carry on or transact business in a State other than that of its corporate *situs*, except by the consent of such other State, either expressly given or implied, upon principles of interstate comity.

Hooper *v.* California, 155 U. S., 648, 652.

Waters-Pierce Oil Co. *v.* Texas, 177 U. S., 28, 46.

We also concede that such permission or authority may be revoked or annulled, so far as *future* business is concerned.

Doyle *v.* Continental Ins. Co., 94 U. S., 535, 537.

Insurance Co. *v.* Morse, 20 Wall., 445, 450.

But we deny that such revocation of consent or authority can apply to existing contracts and obligations of such corporation in the foreign State, or to contracts and obligations of individual citizens of that State to it. And we deny that rights acquired and vested by contract relations existing between such corporation and individual citizens of a foreign State can be divested, or the obligation of the contracts impaired by State legislation limiting or withdrawing the right of the foreign corporation to transact business in such State. It is only *future*, not *past*, business and contracts that can be affected by such legislation.

We submit that the contract rights of Bedford, as a member of appellee, to receive an "advance" of the par or maturity value of his shares, and of appellee to make such "advance," cannot be impaired by subsequent State legislation, even though the "advance" to Bedford was made after the passing of the laws of 1891, and without compliance therewith upon the part of appellee.

American B. & L. Assn. *v.* Rainbolt, 48 Neb., 434; 67 N. W. Rep., 493, 498-500.

Von Hoffman *v.* Quincy, 4 Wall., 535, 553.

Shreveport *v.* Cole, 129 U. S., 36, 42.

Steamship Co. *v.* Joliffe, 2 Wall., 450, 457, 458.

County of Clay *v.* Society for Savings, 104 U. S., 579, 590.

Red Rock *v.* Henry, 106 U. S., 596, 604.

Cooper *v.* Ferguson, 113 U. S., 727, 736.

Osborn *v.* Nicholson, 13 Wall., 654, 656.

Long *v.* Walker, 105 N. C., 94; 10 S. E., 858, 859.

Nevada Bank *v.* Steinmitz, 64 Cal., 316; 30 Pac., 970-974.

Tufts *v.* Tufts, 8 Utah, 146; 30 Pac., 309-310.

Garneau *v.* Port Blakesley Mill Co., 8 Wash., 471; 36 Pac., 463-464.

Bedford's right to an "advance" from the appellee became vested when he became a stockholder in January, 1891. No subsequent State legislation could impair that right. He made application for the "advance" on March 20, 1891, *before the passage of the Acts of March 26th and 28th*, and thereby indicated his purpose to avail himself of his right to an "advance." The "advance" was granted *by the act of the board of directors of appellee, passing upon the application in Syracuse, N. Y.*, on May 18, 1891. Such action of the board in New York was not in violation of the Tennessee statutes that had been passed and taken effect between the date of the application for the loan and the date that it was granted in New York. The mere execution of the notes and mortgage in Tennessee at a subsequent date in closing the contract up, the notes being made payable in New York, cannot change the rights of the parties which had attached long before. The Tennessee Acts, if construed to make this contract void, are themselves unconstitutional, because they impair the obligations of a contract, seek to divest vested right, and, so far as Bedford is concerned, might well be held to interfere with his rights, privileges and immunities as a citizen of the United States.

Korn *v.* Mutual Assurance Soc., 6 Cr., 192, 199.

White *v.* Hart, 13 Wall., 646-654.

The Homestead Cases, 22 Gratt., 266; 12 Am. Rep., 507, 515.
American B. & L. Assn. *v.* Rainbolt, 48 Neb., 434; 67 N. W. Rep., 493, 498–500.

It makes no difference whether the contract between the parties was executory or executed, so far as the protection of the constitutional provision against the impairment of the obligation of contracts by State legislation is concerned.

Charles River Bridge *v.* Warren Bridge, 11 Pet., 420, 573.
Fletcher *v.* Peck, 6 Cr., 87, 135–139.

And implied as well as express contracts are protected.

Fisk *v.* Jefferson Police Jury, 116 U. S., 131, 134.
Gunn *v.* Barry, 15 Wall., 610, 622, 623.

While the appellee, being a corporation, cannot claim the benefits of the privileges and immunities secured to citizens of the several States by the Federal Constitution, yet appellant Bedford was protected by those constitutional guarantees at the time he secured the "advance" of the par or maturity value of his shares by the appellee. He secured that "advance" because of his legal rights as against the appellee under his contract of membership, and the constitutional provisions protected him, so far as that transaction was concerned, against the provisions of the Tennessee Acts of March 26, 1891, he being entitled, notwithstanding his residence in Tennessee, to the same privileges and immunities belonging to a citizen of New York and, under the laws of New York, having the rights attaching to membership in appellee as a New York corporation. In short, the rights of Bedford as a member of appellee were exactly the same as the rights of any New York share-

holder, and a mere exercise by him of those rights in the State of Tennessee was no violation of the Tennessee Acts of March 26, 1891, and, having exercised his rights of membership under his contract of membership with appellee, and in accordance with the laws of New York, appellant Bedford is certainly now estopped from claiming that the contract into which he entered was illegal and void under the laws of Tennessee.

Waters Pierce Oil Co. *v.* Texas, 177 U., S., 28, 45.
Blake *v.* McClung, 172 U. S., 239, 250.
New York *v.* Roberts, 171 U. S., 658.
Chubb *v.* Upton, 95 U. S., 665.

II.—WAS THE TRANSACTION BETWEEN BEDFORD AND APPELLEE INTERSTATE COMMERCE? We do not concede that appellee, in its transactions with appellant Bedford was not engaged in interstate commerce. On the contrary, we insist that the appellee, so far as its business in Tennessee is concerned, was engaged in interstate commerce, and that the transactions between Bedford and appellee were "commerce" and "commerce between the States" at that.

Cooper Manufacturing Co. *v.* Ferguson, 113 U. S., 727, 736. Concurring opinion of Justices Matthews and Blatchford.

True, it has been held that contracts of insurance are not commerce, being mere contracts of indemnity against loss.

Paul *v.* Virginia, 8 Wall., 168, 183.
Liverpool Ins. Co. *v.* Mass., 10 Wall., 566, 573.
Hooper *v.* California, 155 U. S., 648, 653, 654.
New York Life Ins. Co. *v.* Cravens, 178 U. S., 389.

And it has also been held that a broker, engaged in the sale and transfer of foreign bills of exchange, was not engaged in the transaction of interstate commerce, and, therefore, was not exempted from a State law imposing a tax on exchange and money brokers.

Nathan *v.* Louisiana, 8 How., 73, 80.

But in that case it was conceded that "money is * * * an instrument of commerce, and so is a bill of exchange." And the law is now well settled that a State tax upon an instrument of interstate commerce is unconstitutional.

Western U. Tel. Co. *v.* Pennsylvania, 128 U. S., 39.

Ratterman *v.* W. U. Tel. Co., 127 U. S., 411, 423.

Le Loup *v.* Port of Mobile, 127 U. S., 640.

And from this it necessarily follows that a State law prohibiting a foreign corporation from doing business in such State, if construed as preventing a citizen of the State from executing a promissory note payable to such foreign corporation in the State of its corporate *situs*, would be a regulation of an instrument of interstate commerce, and, therefore, within the inhibition of the Federal Constitution.

Hamilton's Works (Lodge's Ed.), Vol. 3, pp. 179, 203.

Prentice on "The Commerce Clause," 47, 48.

Osborn *v.* U. S. Bank, 9 Wh., 738, 859, 867.

Likewise, a law preventing a foreign corporation from accepting such a promissory note payable at the corporate domicile and transmitting in exchange therefor, either in currency or by draft, money advanced to the maker of the note, would be an un-

constitutional interference with interstate commerce.

Welton *v.* Missouri, 91 U. S., 275, 277.

And it seems to be settled law that the mere taking of foreign security, such as a mortgage to secure the payment of the note delivered at the corporate domicile, "does not alter the locality of the contract." "Taking foreign security, does not necessarily draw after it the consequence that the contract is to be fulfilled where the security is taken. Legal fulfillment of a contract of loan on the part of the borrower is repayment of the money, and the security given is but the means of securing what he has contracted for, which, in the eye of the law, is to pay where he borrows, unless another place of payment be expressly designated by the contract. No tender would have been effectual to discharge the mortgagee unless made in Rhode Island."

DeWolf *v.* Johnson, 10 Wh., 367, 383.

It is left unsettled, so far as the decisions of this Court are concerned, whether the sending of a note from one State to another to be discounted in the latter State, is interstate commerce.

Bamberger *v.* Schoolfield, 160 U. S., 149, 167.

But, we do not see how it can be gainsaid that the appellant Bedford as a member of the Eastern Building and Loan Association, in making application to it for an "advance," having that application granted in New York, then executing his notes payable in New York and transmitting them to the appellee in that State where they were accepted, receiving in exchange, by a draft payable in New York, the money representing the "advance," collecting that draft in New York and securing his notes payable in New York by the execution of a mortgage upon Tennessee property, was engaged in dealing with the instruments of commerce, and was

throughout in his dealings with appellee upon this subject, engaged in the transaction of interstate commerce. The determination of what is commerce between the States rests upon the general commercial usages of the country and the construction of the commerce clause of the Federal Constitution by this Court.

Schollenberger *v.* Pennsylvania, 171 U. S., 1.

Bowman *v.* Railway Co., 125 U. S., 465, 501.

It is not an essential of interstate commerce that there shall be a transportation of goods or merchandise between States. "Interstate commerce consists of intercourse and traffic between the citizens and inhabitants of different States and includes not only the transportation of persons and property and the navigation of public waters for that purpose, but also the purchase, sale and exchange of commodities."

Addyston Pipe & Steel Co. *v.* United States, 175 U. S., 211, 241.

Gloucester Ferry Co. *v.* Pennsylvania, 114 U. S., 196, 203.

Kidd *v.* Pearson, 128 U. S., 1, 20.

County of Mobile *v.* Kimball, 102 U. S., 691–702.

Certainly the transaction in the case at bar was both "intercourse" and "traffic" between citizens and inhabitants of different States.

FIRST.—Appellant Bedford subscribed for a part of the capital stock of the appellee, agreeing to pay for such stock in monthly installments, called dues, and by such purchase of stock in the appellee he acquired, as a stockholder, an undivided interest in the corporate properties at the corporate *situs*.

Murfree on Foreign Corp., § 381;

Bank of Augusta *v.* Earle, 13 Pet., 519;

Plimpton *v.* Bigelow, 93 N. Y., 592;
Moore *v.* Gennett, 2 Tenn. Chy., 375;
Youngs *v.* South Tredegar I. Co., 85 Tenn., 189; 4 Am. St. Rep., 752;

And also a right to participate in the profits of the corporation,

Endlich on Building Assns. (2d ed.), § 469;
Plimpton *v.* Bigelow, 93 N. Y., 592, 599;
Burrall *v.* Bushwick R. Co., 75 N. Y., 211, 216;
People *ex rel.* Wiebusch, &c., Co. *v.* Roberts, 154 N. Y., 101, 107;

such profits being applied, in building and loan association parlance, for the purpose of "maturing" his stock, that is, of carrying the stock to its face or par value in advance of the time when Bedford's mere payment of "dues" upon the stock would mature it.

"When the payments to the association, together with the distributive profits after the deduction of expenses, equal the face value of the stock, then the stock is matured; the certificates are then called in and the holder receives the face value thereof in cash, unless he is a borrower of the association, and in that event his indebtedness is canceled."

Thompson on Building & Loan Assns. (2d ed.), § 4, p. 9; see also *Id.*, § 134, p. 258, and § 190, p. 378.

SECOND.—As a part of the privileges incident to his membership in the corporation, granted to him in consideration of his subscription for its stock, Bedford acquired the absolute right to have advanced to him, upon the terms fixed by the articles of incorporation and by-laws of the appellee, the par or maturity value of his stock, the only condition necessary to be complied with upon his part being an observance of the rules and regulations of the

association and the giving of adequate real estate security for the "advance."

Endlich on Building Assns. (2d ed.), §§ 20, 88.
7 Thompson on Corp., §§ 8724, 8726.

THIRD.—Bedford availed himself of this privilege by the application which he signed on March 20, 1891, and the "advance" was subsequently made to him as heretofore set forth in detail (*Ante*, pp. 59-63, fols. 177-188), and as an incident of this transaction, executed his notes to appellee, payable at Syracuse, N. Y., and secured the same by the execution of a mortgage upon property in Tennessee. It will be noted that the notes and mortgage executed by Bedford include and cover the indebtedness and obligations of Bedford on account of his subscription for stock, and, therefore, both the notes and the mortgage are given, in part at least, to secure the performance of an obligation antecedent to the enactment of the Tennessee laws of March 26, 1891, and antecedent also to the obligations of Bedford growing out of the "advance" to him, granted upon his application of March 20, 1891.

Ante, pp. 12-15, fols. 36, 37, 38, 42, 43, and pp. 56, 57, fols. 166-170.

FOURTH.—Viewed in its proper light, the notes and mortgage of Bedford to appellee do not, in reality, secure the repayment of a loan of money, *but only obligate Bedford to comply with the articles of incorporation and by laws of the appellee*, and make payment to it, at its home office in Syracuse, of dues upon his stock and premiums and interest upon the "advance" to him until such time as the stock should mature, at which date he would become entitled to set-off the maturity value of his stock against the "advance" that had been made to him, and demand the cancellation of his mortgage.

Notwithstanding the execution of the notes and

the fixing of a definite number of payments and a definite amount to be paid, it is settled by repeated decisions of the courts of New York and by one decision in Tennessee that such notes represent only an estimated period of stock maturity in the appellee, and are not binding as a definite contract that the number of payments or the amount to be paid may not exceed the sum stipulated in the notes and mortgage.

House *v.* Eastern B. & L. Assn., 52 App. Div. (N. Y), 163.
Heslin *v.* Eastern B. & L. Assn., 28 Misc. (N. Y.), 376.
O'Malley *v.* People's Assn., 92 Hun (N. Y.), 572.
Miller *v.* Eastern B. & L. Assn., 53 S. W. Rep., 231 (Tenn.).

Is not such a transaction as this between a corporation of New York and its stockholder in Tennessee, involving traffic in the corporate stock and a transfer of negotiable securities for money, when consummated in the manner that this transaction was, interstate commerce within the meaning of the Federal Constitution?

It is settled law that the business of transmitting telegraphic messages between the States is protected by the commerce clause of the Constitution, such messages being regarded as instruments of commerce, and, consequently, not subject to State control.

LeLoup *v.* Port of Mobile, 127 U. S., 640, 645.
Telegraph Co. *v.* Texas, 105 U. S., 460.
Pensacola Telegraph Co. *v.* Western Union Telegraph Co., 96 U. S., 1.

And so it is established that a "drummer" engaged in soliciting the purchase of articles of commerce by the citizens of a State, cannot be subjected to a license tax by such State, because this

would establish an unconstitutional regulation of commerce between the States.

Robbins *v.* Shelby Co. Taxing Dist., 120 U. S., 489.

Nor can any State exclude from its territory a corporation engaged in interstate commerce.

Cooper Mfg. Co. *v.* Ferguson, 113 U. S., 727.
Crutcher *v.* Kentucky, 141 U. S., 47.
Steamship Co. *v.* Pennsylvania, 122 U. S., 326.
Gloucester Ferry Co. *v.* Pennsylvania, 114 U. S., 196.
Railroad Co. *v.* Husen, 95 U. S., 465, 470.
Sherlock *v.* Alling, 93 U. S., 99, 103.

Nor can any State impose any conditions on the transaction of interstate commerce within such State.

Chy Lung *v.* Freeman, 92 U. S., 275.
New York *v.* Compagnie, etc., 107 U. S., 59.
Henderson *v.* The Mayor, 92 U. S., 259.
Brown *v.* Maryland, 12 Wh., 419.
Fritts *v.* Palmer, 132 U. S., 282.
Holder *v.* Aultman, 169 U. S., 81.

In the light of these principles and authorities we respectfully invoke the opinion of this Court as to whether or not the transaction between the appellant Bedford and the appellee does not constitute commerce between the States within the meaning of the Federal Constitution.

III.—THE FOURTEENTH AMENDMENT: DOES IT PROTECT THE APPELLEE? The Tennessee Statutes of March 26, 1891, if given the construction contended for by appellants, not only impair the obligation of a contract but deny to appellee "the equal protec-

tion of the laws" of the State of Tennessee which is guaranteed to all persons within the jurisdiction of any State by the XIVth Amendment to the Constitution of the United States.

Santa Clara Co. *v.* Southern Pacific R. R., 118 U. S., 394.
Crutcher *v.* Kentucky, 141 U. S., 47.
Cooper Mfg. Co. *v.* Ferguson, 113 U. S., 727.
Steamship Co. *v.* Pennsylvania, 122 U. S., 327.
Gloucester Ferry Co. *v.* Pennsylvania, 114 U. S., 205.

Within the meaning of this clause of the amendment, a corporation is a "person" entitled to the equal protection of the laws.

Pembina Mining Co. *v.* Pennsylvania, 125 U. S., 181.
Minneapolis R. Co. *v.* Beckwith, 129 U. S., 26.
Smyth *v.* Ames, 169 U. S., 466.

Hence, we submit that to pass laws depriving Tennessee stockholders in a New York corporation of their rights as stockholders to the benefits of the corporate organization, and making their contracts with the New York corporation void and unenforcible in the courts of Tennessee, merely because of the giving of a mortgage upon Tennessee property to secure the performance of the stockholder's obligations to the corporation, would be a denial of the equal protection of the laws.

Allgeyer *v.* Louisiana, 165 U. S., 578.
Hopkins *v.* United States, 171 U. S., 578, 602, 603.
United States *v.* Joint Traffic Ass'n, 171 U. S., 505, 572.
West Mass. Fire Ins. Co. *v.* Hilton, 42 App. Div. (N. Y.), 52.
Milliken *v.* Pratt, 125 Mass., 374.
Tilden *v.* Blair, 21 Wall., 241.

The right of appellee, a corporation of New York, to enter into contracts under the laws of New York with appellant Bedford, a citizen of Tennessee, the State of Tennessee cannot by its laws either abridge or deny.

R. S. U. S., § 1977.
Yick Wo. *v.* Hopkins, 118 U. S., 356, 369.
Santa Clara County *v.* So. Pac. R. Co., 118 U. S., 394, 396.

And such contracts, when to be performed in New York by the payment of Bedford's notes and obligations in that State at the home office of the corporation of which he was a member and in strict compliance with the laws of New York and the corporate charter, and for the purpose of discharging the obligations assumed by Bedford as a member of the corporation, are beyond the reach of legislation by the State of Tennessee; and the mortgage to secure the payment of such notes and obligations is enforcible in the Federal courts in Tennessee without regard to State legislation intended to invalidate the contract.

Allgeyer *v.* Louisiana, 165 U. S., 578.
Holden *v.* Hardy, 169 U. S., 366, 391.
Lauter *v.* Jarvis-Conklin Mortgage Co. (C. C. A.), 85 Fed. Rep., 894.
Jarvis-Conklin Mortgage Co. *v.* Willhoit, 84 Fed. Rep., 514.
Cæsar *v.* Capell, 83 Fed. Rep., 403.

Compare:

Civil Rights Cases, 109 U. S., 3, 16, 17
Gibson *v.* Mississippi, 162 U. S., 565, 582, 583.
Neal *v.* Delaware, 103 U. S., 307.
Robbins *v.* Shelby Taxing Dist., 120 U. S., 489, 497.
Ex parte Virginia, 100 U. S., 339, 346, 347.

"Doubts may at one time have existed upon the subject but it is now well settled that a State law cannot discharge or suspend the obligation of a contract made in another State if it was legal where it was made and was a contract with a citizen of another State, not even if it was to be performed in the State whose law is invoked to defeat the remedy."

Clifford, Justice, in Green *v.* Collins, 3 Cliff., 494; s. c., Federal Cases No. 5755.

Nor does it make the slightest difference in this doctrine that the notes payable in New York were executed in Tennessee and secured by a mortgage upon real property in that State.

Ware *v.* Bankers' Loan & Investment Co., 95 Va., 680; s. c., 64 Am. St. Rep., 826.

Bennett *v.* Eastern B. & L. Ass'n, 177 Pa. St., 233; s. c., 55 Am. St. Rep., 723.

Bank of Harrison *v.* Gibson, 60 Ark., 269.

Andrews *v.* Pond, 13 Pet., 65, 78.

Scudder *v.* Union Bank, 91 U. S., 411.

Scotland County *v.* Hill, 132 U. S., 117.

Coghlan *v.* South Carolina R. Co., 142 U. S., 110.

Mutual Life Ins. Co. *v.* Phinney, 178 U. S., 327, 328.

London Assurance *v.* Companhia de Moagens, 167 U. S., 161.

Brown *v.* Jones, 125 Ind., 379; s. c., 21 Am. St. Rep., 230.

Burckle *v.* Eckhart, 3 N. Y., 135.

Abt. *v.* American, &c., Bank, 159 Ill., 467; s. c., 50 Am. St. Rep., 170.

Shoe, &c., Bank *v.* Wood, 142 Mass., 563.

Orcutt *v.* Nelson, 1 Gray, 536.

Johnston *v.* Gawtry, 83 Mo., 339.

The by-laws of the appellee required all payments to be made by both "advanced" and unadvanced members at the home office in Syracuse, and this applied not only to "dues" or "calls" upon stock, but also to payments of "premiums" and "interest" by "advanced" or borrowing members.

By-Laws, Art. XIX., §§ 1, 3, 10, 11, 12, 14, 16; Transcript, pp. 59-62.
Andruss *v.* Peoples' B. L. Assn. (C. C. A.) 94 Fed. Rep., 575.

The notes were all made payable at the home office of the appellee, in Syracuse.

Ante, p. 63, fols. 187, 188;
Transcript, pp. 71, 77.

And the mortgage expressly recognizes this fact and binds appellant Bedford to pay the notes in New York.

Transcript, p. 23.

Does it not follow that any construction of the laws of Tennessee which would invalidate these notes and make unenforcible this mortgage, would deprive the appellee of the equal protection of the laws and of its property without due process of law, and would not any laws necessarily so construed be unconstitutional and void? In the light of many leading cases above cited it would seem so.

IV.—THE PLACE OF CONTRACT: THE LAW OF NEW YORK GOVERNS: "DOING BUSINESS." That appellee in making the "advance" to appellant Bedford and accepting the notes and mortgage to secure his obligations to the corporation was not "doing business" in Tennessee within the meaning of the Tennessee laws which appellants invoke is, as we believe, manifest upon the face of the record.

The purchase of stock in a corporation of another State, even though it is done through a

soliciting agent in the State of the residence of the purchaser, is not "doing business" in that State in violation of the laws thereof forbidding the transaction of business in such State by foreign corporations.

Payson *v.* Withers, 5 Biss., 272, Opinion per Gresham, *J.*

Nor is the lending of money to a citizen of a State where a foreign corporation is not authorized to do business, and the acceptance of a mortgage upon lands in such State for the purpose of securing the repayment of the loan, "doing business" within such State when the notes secured by the mortgage are made payable in the State of the corporate domicile and the contract is a unilateral one.

Caesar *v.* Capell, 83 Fed. Rep., 403.
Sullivan *v.* Sheehan, 89 Fed. Rep., 247.
Neal *v.* B. & L. Assn., 100 Tenn., 607.
Andruss *v.* People's B. & L. Assn., 94 Fed. Rep., 575.

But, in the case at bar, there was no mere lending of money and the execution of notes and a mortgage to secure repayment. The transaction was of a totally different nature, and far less susceptible of being construed as the "doing of business" in the prohibited State by a foreign corporation.

"It is abundantly established by the decisions of the United States Courts that no matter what business a corporation does in another State, its residence is exclusively in the State of its creation."

Reimers *v.* Seatco Mfg. Co. (C. C. A.), 70 Fed. Rep., 573, 577.
Shaw *v.* Quincy Mining Co., 145 U. S., 444, 449, 450.

Hence, the appellee was not in any sense present in Tennessee in the dealings with appellant Bedford. Bedford became a stockholder in appellee before

the passage of the Tennessee Acts of March 26, 1891. This is not denied.

Ante, pp. 57–59, fols. 171, 172, 173, 174, 177.

Transcript, pp. 26, 27; Deposition of D. A. Pierce.

By his subscription for stock and acceptance of the stock certificate transmitted to him by appellee before the passage of the statutes in question, he became a member of appellee, with all the rights and privileges of membership, as well as subject to its obligations and duties. His application for a loan or "advance" speedily followed his membership and also antedated the Tennessee Acts of March 26, 1891.

Ante, p. 58, fol. 174.

Transcript, p. 63, fol. 79; p. 66, fol. 82.

True, the appraisement of the property offered as security for the "advance" was not made by the "Local Board" at Memphis until May 5, 1891 (*ante*, p. 59, fol. 177), but the application—that is, the offer to contract for an "advance"—was executed by Bedford on March 20, 1891, *six days before* the enactment of the Tennessee statutes of March 26, 1891

Ante, p. 58, fol. 173, ¶ VIII.

And such offer to make a contract and become an "advanced" or borrowing member of appellee was transmitted to appellee at its home office in Syracuse for acceptance or rejection by it.

Ante, pp. 60–61, fols. 178–181.

This was in accordance with the articles of incorporation and by-laws of appellee, by which appellant Bedford, as a stockholder, was and is bound.

Articles of Incorporation, §§ VIII., X.;

Transcript, pp. 44–49.

By-laws, Art. V., § 2; Art XIX., §§ 1, 3, 4, 10, 11, 12, 14, 16;
Transcript, p. 56 and pp. 59-62.

And the by-laws expressly provided that "all applications for loans shall be filed and numbered consecutively as received and be *examined and approved or rejected by the Board* in their regular order."

By-laws, Art. XV., § 1.
Transcript, p. 62.

The by-laws also provide that "all applications for loans are part of the contract of shareholders with this Association."

By-laws, Art. XV., § 2;
Transcript, p. 62.

Hence we submit that when the application for a loan or "advance" by appellant Bedford was "examined and approved" by the Board of Directors of appellee at the home office of the appellee, in Syracuse, on May 18, 1891, a perfectly legal and valid contract was made, and became by such acceptance binding upon the parties, subject only to compliance with conditions precedent by the appellant Bedford, namely, the making of notes payable to appellee at its home office in Syracuse, New York, the pledging of appellant's stock as collateral, and the execution of a mortgage upon the real estate named in the application of March 20th as security for the "advance" or loan applied for.

Ante, p. 60, fols. 179, 180, and Transcript as there cited.
Giddings *v.* Ins. Co., 102 U. S., 108, 111.

And when the notes of appellant, payable to appellee at its home office in Syracuse, New York, together with the mortgage securing the same, were finally transmitted to appellee at Syracuse and there accepted by it, and the money to which appellant Bedford was entitled as an "advance" then paid to

him by New York draft drawn in his favor by appellee and duly received by him, and when he collected the same in New York, as the record shows he did, it seems to us too clear for further argument that the contract obligations of appellant Bedford to appellee arose in New York, under the laws of New York, must be governed and determined by those laws, and that the transaction between appellant Bedford and appellee was not the doing of business by appellee within the State of Tennessee.

Ante, pp. 60-63, fols. 182-188; also *ante*, p. 66, fol. 196.

Having thus presented, from appellee's point of view, the facts and the law regarding the contract relations between appellants and appellee, we now pass to a consideration, in their order, of th several questions certified by the Circuit Court of Appeals, and in this connection will review, so far as we deem necessary, the points made and the authorities cited in appellant's brief herein.

VI.

The first question certified to this Court by the Circuit Court of Appeals is as follows:

"WAS THE VALIDITY OF THE NOTES SIGNED IN TENNESSEE BY THE MAKER, MANUALLY DELIVERED BY HIM TO THE SOLICITING AGENT OF THE ASSOCIATION AT MEMPHIS TO BE TRANSMITTED TO THE ASSOCIATION AT SYRACUSE FOR THE ACCEPTANCE OF THE ASSOCIATION AT THAT PLACE AND PAYABLE AT SYRACUSE, TO BE DETERMINED BY THE LAWS OF TENNESSEE OR OF NEW YORK?"

We submit that the response to this question should be that the validity of the notes is to be determined by the laws of New York, which is the

place of performance. The general principle in relation to contracts made in one place to be performed in another is well settled. They are to be governed by the law of the place of performance.

Miller *v.* Tiffany, 1 Wall., 298, 310.
Andrews *v.* Pond, 13 Pet., 65.
Scotland County *v.* Hill, 132 U. S., 107, 117.
Pritchard *v.* Norton, 106 U. S., 124, 136.
Liverpool, &c., Steam Co. *v.* Phœnix Insurance Co., 129 U. S., 397, 458.
Coghlan *v.* South Carolina R. R. Co., 142 U. S., 101, 110.
London Assurance *v.* Companhia de Moagens, 167 U. S., 149, 160.
Mutual Life Ins. Co. *v.* Phinney, 178 U. S., 327, 338.

The notes of appellant Bedford were executed to appellee to secure the performance of his obligations as a stockholder and represented his contract to repay to appellee, in the form of "dues," "premiums" and "interest" money which he had obtained from appellee as an "advance" upon his stock under the articles of association and by-laws of the appellee. The notes, therefore, represent merely an honest promise to pay money in the State of New York. If possible, the law of that State should be applied, which will uphold them in their integrity rather than the law of the State which will permit their repudiation.

This being a case in which the laws of Tennessee are invoked by the appellants, decisions of the Supreme Court of that State ought to be of weight upon this question. That Court has many times held that the validity of a note must be determined by the law of the place of payment.

Neal *v.* Building & Loan Assn., 100 Tenn., 697.
Norton *v.* Trust Co. (Ch. App.), 46 S. W. Rep., 544.

Pioneer Loan Co. *v.* Cannon, 96 Tenn., 599.
Hubble *v.* Loan Co., 95 Tenn., 589.
Nelson *v.* Haywood County, 97 Tenn., 782.
Bearden *v.* People's Association (Tenn.), 49 S. W. Rep., 757.

In the first of the Tennessee cases above cited, the notes and mortgage were attacked on the same ground as that here relied on by appellants. The Supreme Court held that they were Louisiana contracts because payable in that State and were, therefore, not affected by the Acts of 1891; this notwithstanding the contracts were all actually made in Tennessee, the corporation being represented by its attorney. The second case was of the same character. The other cases were cases in which the contracts were attacked on the ground of usury. In each instance the notes and trust deeds bore on their face a rate of interest in excess of that allowed in Tennessee, and this, under the Tennessee law, made them absolutely void. The contracts were upheld, however, because payable in a State where the rate was legal, and such is the general rule in Tennessee as to contracts usurious in that State, but not usurious at the place of payment.

Bolton *v.* Street, 3 Coldw. (Tenn.), 31.

The leading text writers cite almost innumerable authorities in support of the foregoing propositions.

Story on Conflict of Laws (8th ed.), §§ 291–305.
Story on Bills, §§ 161–172.
Story on Promissory Notes, §§ 161–172.
1 Daniel on Negotiable Instruments (edition of 1891), p. 930.
Dicey on Conflict of Laws, pp. 616,617.

Appellants, in their brief, doubt the meaning of the Circuit Court of Appeals as expressed in this

question, and say, "We understand the question to be based simply on the idea that the notes were payable in New York" (Appellant's Brief, p. 18). They add: "We contend that the contract in question was closed in Tennessee when Bedford executed the notes and mortgage, and that if his contract be considered a New York contract, it is simply one in the sense of the notes being payable on their face in New York" (Appellant's Brief, p. 18). They further contend: "The contract was closed and made when Bedford in Tennessee signed the notes and mortgage," and they say, "When they were sent on to New York after being signed, it was not for acceptance by the association in the sense that the contract was to be closed by the association's agreeing to it there" (Appellants' Brief, p. 18). The necessary corollary of this proposition is the contention of appellants that the validity of the notes is to be determined by the laws of Tennessee and not by the laws of New York (Appellants' Brief, pp. 18-45). Yet they concede that "a contract is made when and not before it has been executed or *accepted* by *both* parties so as to become binding on both," and they admit that the case from which they quote the above statement held that a contract was an Ohio contract "because of an express stipulation therein that it was not to be valid unless *approved in Ohio.*"

Holder *v.* Aultman, 169 U. S., 89.
Appellants' Brief, p. 20.

This admission, we think, answers and finally disposes of appellants' contention upon the point now under consideration, and if so it will render unnecessary an examination of the numerous cases they subsequently cite in support of their views.

Bedford's contract relations with appellee began when he made application for stock. This application had to be submitted to appellee and accepted by it at its home office in Syracuse, New York.

By-Laws, Art. XIX., § 2;
Transcript, p. 59.

A contract to subscribe for the stock of a foreign corporation is a contract to be performed at the corporate situs.

Penobscot, etc., R. Co., *v.* Bartlett, 12 Gray (Mass.), 244.

Bedford's stock certificate had to be and was issued and signed by the corporate officers at Syracuse, and its issuance constituted an acceptance of the application for stock, and made the contract of membership complete.

By Laws, Art. VI., § 1;
Transcript, p. 56.

The stock certificate, by its terms, provides that "all payments under this certificate are payable at the home office of the association at Syracuse." It also provides that the by-laws of the corporation, "which are attached to and endorsed hereon are a part of this contract, and such by-laws and this certificate shall be construed together as part of the contract between the association and the shareholder."

"Stock certificate," Transcript, pp. 125, 126.

The by-laws require the payment of all sums by way of "dues," "premiums" and "interest" to be made by stockholders to the secretary at the home office.

By-Laws, Art. XIV., § 16;
Transcript, p. 61.

The articles of incorporation, by which Bedford necessarily became bound, and of which he stood charged with notice from the time of his application for membership, specifically provide how and upon what terms and conditions "advances" may be made to members, and stipulate the "premiums" and "interest" to be paid upon "advances," so that all claims in appellants' brief of Bedford's lack

of knowledge and understanding of his agreements go for naught.

Articles of Incorporation, Par. 10;
Transcript, p. 47.

Bedford's application for an "advance" or loan was subsequently made upon a blank furnished by the association (*Ante*, p. 5, fol. 14), and in that application he expressly offers to give and execute notes, and that his wife shall join therein.

Transcript, p. 65, Par. 45.

He also agrees to execute a mortgage, and stipulates that "*all payments are to be paid at such place as the lender may direct.*"

Transcript, p. 64, top of page.

His application for an "advance" or loan having been submitted to the Board of Directors of appellant at the home office in Syracuse, and there examined and approved (*Ante*, pp. 59–61, fols. 177–181), he thereupon addressed a letter to the Board of Directors of appellee at Syracuse, N. Y., asking that an "advance" be "granted" and expressly agreeing to "comply with the charter and by-laws" and all requirements of the board or its committee.

Transcript, p. 67, fol. 84.
Ante, p. 60, fols. 178–180.

"This letter was accompanied by a mortgage to the association, duly executed and acknowledged by Bedford and wife before a notary in Shelby County, Tennessee, of the land in that county previously *tendered as security*. The mortgage had been duly registered in Shelby County."

Transcript, p. 128, "Certificate."

The letter, the mortgage and the notes secured by the mortgage were transmitted through H. B. Martin to the appellee at its home office in Syracuse, New York, *for acceptance there*, no action having previ-

ously been taken upon them by any person in Tennessee, and there being no person in Tennessee with authority to take such action.

Deposition D. A. Pierce, Transcript, pp. 28, 29, 30; Interrogatories 10, 11, 15.
Also Transcript, p. 32, Deposition D. A. Pierce, Interrogatories 19, 20.
Also Transcript, p. 42, Deposition D. A. Pierce, Cross-interrogatory 18.

And thereupon the general attorney of the association, at its home office in Syracuse, having satisfied himself that all the papers were complete, the appellee accepted the notes and mortgage at Syracuse, and consummated the contract by making its draft for the amount to which appellant Bedford was entitled, and transmitting it to him in payment of the loan or "advance." It was a New York draft, and, therefore, its actual collection by Bedford had to be in New York.

Transcript, p. 29, Deposition D. A. Pierce, Int. 15 and ans.
Also Transcript, p. 68, fol. 85.

The notes were all made payable in Syracuse (Transcript, pp. 71-77), and the mortgage was executed, not merely to secure the payment of the notes, but also to secure the payment of all obligations of Bedford to appellee as a stockholder.

Transcript, pp. 7, 8, 9.

Then, as a part of the transaction and by way of collateral or pledge as required by the articles of incorporation and by-laws of the appellee, Bedford's stock certificate was properly endorsed and delivered to the appellee at Syracuse along with the notes and mortgage.

Aule, p. 62, fol. 186.

Upon this state of facts, we submit that the validity of the notes is to be determined by the laws of

New York, and that they are, for all purposes, New York contracts, the minds of the parties having met in New York: *first*, when Bedford's application for stock was granted and the stock certificate was issued to him; *second*, when his application for a loan or "advance" was "examined and approved" by appellee's Board of Directors at Syracuse; and, *third*, when his notes and mortgage were actually accepted and the draft payable to his order was made and transmitted to him, as shown above. Then, and not until then, were all the contracts closed, and all of them, on this state of facts, would seem to be New York and not Tennessee contracts.

In view of these facts, we do not deem it necessary to do more than direct the attention of the Court to the following propositions of law and authorities in support thereof:

The place where payment of a contract is to be made determines the place of its performance, and the law of the place of performance is the law which governs as to the validity and interpretation of the contract.

Wa-hington Central Bank *v.* Hume, 128 U. S., 195, 197, 206.

Coghlan *v.* South Carolina R. R. Co., 142 U. S., 101, 109.

Mutual Life Ins. Co. *v.* Phinney, 178 U. S., 327, 328.

Assuming that the law of the place of performance must govern in this case as in ordinary cases upon the facts above stated, we are confronted with the further contention upon the part of appellants that the execution of these notes in Tennessee in the manner above stated is a transaction so opposed to the public policy of Tennessee as to be unenforcible in that State, either in the Federal or the State courts. This contention rests upon the ground that the Tennessee Acts of March 26, and March 28, 1891, should be so construed as to render absolutely void

any contract entered into in violation of those acts by a foreign corporation. Appellant's counsel in their brief state this proposition thus: "Now, it would seem from all of the foregoing, that whether the contract in question between Bedford and the Eastern Building and Loan Association was technically made in Tennessee or made in New York, that the question whether it can be enforced in Tennessee is to be governed by Tennessee law. Under Tennessee law the contract is absolutely void, and in any event it was against the public policy of the State as declared in its laws as to foreign corporations and in the decisions of the courts construing such laws."

Appellants' Brief, p. 39.

At the time the contracts between appellants and appellee were entered into, as above stated, the Tennessee laws of March 26 and March 28, 1891, had never been construed by the courts of Tennessee. Indeed, they were not enacted by the Legislature until after the appellant Bedford had become a stockholder in appellee and made his application for an advance (*Aule*, p. 59, fols. 176–177).

Hence, the passage of the Tennessee statutes was subsequent to the inception of the contract relations between the parties, and the first decision of the Supreme Court of Tennessee construing the statutory provisions in question was subsequent to the final consummation of the contracts between appellants and appellee (*Aule*, p. 61, fols. 181–183). There is no contention that prior to the laws of March, 1891, the appellee was prohibited from doing business in Tennessee, or that it was doing business in that State in violation of law.

On this state of facts, the Federal courts are not bound to follow decisions of the Supreme Court of Tennessee construing the statutory provisions in question, but are at liberty in this case to place their own interpretation and construction upon these

Tennessee statutes without regard to State court decisions.

Knox County *v.* National Bank, 147 U. S., 91, 99.
Douglass *v.* County of Pike, 101 U. S., 677, 686.
Carroll County *v.* Smith, 111 U. S., 556, 562, 563.
Pease *v.* Peck, 18 How., 595, 599.

"So, when contracts and transactions have been entered into and rights have accrued thereon under a particular state of decisions, or when there has been no decision of the State tribunals, the Federal courts properly claim the right to adopt their own interpretation of the law applicable to the case, although a different interpretation may be adopted by the State courts *after* such rights have accrued."

Burgess *v.* Seligman, 107 U. S., 20, 33.
Pleasant Township *v.* Ætna Life Ins. Co., 138 U. S., 67, 73.

"Another well-grounded exception (to the rule that State court decisions construing State statutes will be followed in the Federal courts) exists where contracts and obligations have been entered upon, but there has been no judicial construction of the statutes, upon which the contract or obligation depends, by the highest court of the State whose statute is involved. In such a case, if a court of the United States *obtains jurisdiction of a question touching the validity, effect or obligation of such a contract*, it will, while 'leaning to an agreement with the State court,' exercise an independent judgment as to the validity and meaning of such a contract, although the meaning and validity of State statutes may be an element in the case, and will not be bound to follow opinions of the State court construing such statute *if such decisions were rendered*

after the rights involved in the controversy originated."

Louisville Trust Co. *v.* City of Cincinnati, 76 Fed. Rep., 296, 301 (C. C. A.).

"We are not aware of any decision of the Supreme Court which materially qualifies the declaration in that case (*Burgess v. Seligman*, 107 U. S. 20), and we deem it our duty to give it full force in deciding the question now under consideration. In other words, as the Act of 1871 had not been construed by the Supreme Court of Illinois when the bonds held by the plaintiff were issued, it is the province and duty of this Court to excercise independent judgment as to its validity under the Constitution of Illinois."

Harlan, Circuit Justice, in O'Brien *v.* Wheelock, 95 Fed. Rep., 883, 903, 904.

"We ought not to give to them (State court decisions) a retroactive effect and allow them to render invalid, contracts entered into with citizens of other States, which, in the judgment of this Court, were lawfully made. For, if such a rule were adopted and the comity due to State decisions pushed to this extent, it is evident that the provision in the Constitution of the United States, which secures to the citizens of another State the right to sue in the courts of the United States, will become utterly useless and nugatory."

Rowan *v.* Runnels, 5 How., 134 139, Taney C. J.

Ohio Life Ins. Co. *v.* Debolt, 16 How., 416, 432.

No State statutes can deprive persons having the requisite diversity of citizenship of their constitutional right to invoke the jurisdiction of the Federal courts

in such State for the enforcement of negotiable obligations payable to them in another State.

Hess *v.* Reynolds, 113 U. S., 73, 77.
Chicot County *v.* Sherwood, 148 U. S., 529, 534.
Clark *v.* Bever, 139 U. S., 96.
Arrowsmith *v.* Gleason, 129 U. S., 86, 98, 99.
Rich *v.* Braxton, 158 U. S., 375, 406.
Smyth *v.* Ames, 169 U. S., 466.

It is manifest from these doctrines that the Circuit Court of the United States for the Western District of Tennessee had a perfect right to give its own construction to the Tennessee statutes in controversy, assuming, for the sake of the argument only, that their provisions are applicable to the promissory notes of appellant Bedford made in Tennessee but payable in New York, and the validity of which is now under consideration.

It seems that the Tennessee Act of March 26, 1891, approved March 28, 1891, being Chapter 2 of the Tennessee Acts of 1891, was repealed without qualification or limitation by the Legislature of Tennessee in 1895. Section 1 of the repealing act reads as follows: "Be it enacted by the General Assembly of the State of Tennessee that Chapter 2 of the Acts of 1891, passed March 26, 1891, and approved March 28, 1891, entitled 'An Act to regulate the business of building and loan associations,' and Chapter 114 of the Acts of 1893, entitled 'An Act to amend Chapter 2 of the Acts of 1891,' passed March 26, 1891, and approved March 28, 1891, be, and the same are hereby, repealed."

Acts of Tennessee, 1895, Ch. 114, p. 180.

Hence, the Act of March 28, 1891, thus repealed, cannot be invoked against appellee, non-compliance

with that Act becoming immaterial because of its repeal.

Ewell *v.* Diggs, 108 U. S., 143.
In re Hall, 167 U. S., 38.
Butler *v.* U. S. B. & L. Assn., 97 Tenn., 679.

So far as Chapter 31 of the Tennessee Acts of 1877, Chapter 95 of the Tennessee Acts of 1891 (being the Act of March 17, 1891) and Chapter 122 of the Tennessee Acts of 1891 (approved March 26, 1891) are concerned, it seems that appellee complied therewith by filing an abstract of its charter with the Secretary of State of Tennessee at Nashville, about August 11, 1893, and by filing a similar abstract in the Register's office of Shelby County, Tennessee, about August 15, 1893.

Transcript, p. 16.
"Stipulation," Transcript, p. 91.

This suit was not instituted until June 24, 1895. (Transcript, pp. 1, 12.) While Chapter 114 of the Acts of Tennessee of 1895, repealing Chapter 2 of the Acts of 1891, as above stated, was passed April 27, 1895, approved May 6, 1895, and took effect "from and after its passage, the public welfare requiring it."

Acts of Tennessee, 1895, Ch. 114, pp. 180, 185.

Hence, before the institution of this suit, appellee had complied with the only laws of Tennessee applicable to business transacted by it prior to 1895, and which were still in force and effect when this suit was instituted.

While we insist, and think we have demonstrated, that appellee never in fact did any business in Tennessee to which any of the acts in question were applicable, yet, even if it should be held that it was

in fact doing business in Tennessee, it appears that before the institution of this suit, it had fully complied with the only Tennessee laws then in force regulating the transaction of business by it in Tennessee, and we submit that having complied with such laws in 1893, it was entitled in 1895 to institute a suit for the enforcement of the contract with appellant Bedford, which had its inception, as has been already shown, before the passage by the Tennessee Legislature of either Chapter 95 or Chapters 2 and 122 of the Tennessee Laws of 1891. (For these laws in full, see Addenda to Appellants' Brief, pp. 74-81.)

On this state of the record, the United States Circuit Court for the Western District of Tennessee, after a full review of all the questions involved, reached the conclusions, *first*, that the notes in question were to be construed and enforced under the laws of New York as New York contracts, and, *second*, that even if the contract relations between appellants and appellee were to be governed by the laws of Tennessee, they would, nevertheless, be binding and enforcible as against the appellants in the Federal courts in Tennessee.

Opinion of Hammond, *J.*, *ante* pp. 26-45.

Passing upon the effect of the filing of the charter of appellee and the abstract thereof in 1893, Judge Hammond says: "It is sufficient to refer to the case of *Cæsar* v. *Cappell*, 83 Fed. Rep., 403, as to the judgment of the Court upon the effect of the filing of the charter with the Secretary of State and the abstract thereof upon August 11, 1893, subsequently to the making of the contract and prior to the passage of the Curative Act of May 10, 1895. We there held that a compliance with the statute prior to the Act of 1895 was in itself a sufficient filing which removed whatever infirmity there was in the contract, and, therefore, it might be enforced by the Courts

without regard to the Act of 1895 subsequently passed."

Ante pp. 44, 45, fols. 132, 133.
Cæsar *v.* Cappell, 83 Fed. Rep., 403.
See also Neuchatel, &c., Co., *v.* The Mayor, 155 N. Y., 373, 376.

The doctrine of *Cæsar* v. *Cappell*, as to the place of contract, has been expressly approved by the Supreme Court of Tennessee, which, in a case almost identical with the case at bar, held that "a contract for the loan of money by a building and loan association, having no office or agency in this State, made direct from its home office in Louisiana, to be secured by a mortgage on land in Tennessee, the loan and each installment note thereon being payable in the former State, is a Louisiana contract, and the Tennessee statutes requiring foreign corporations to register their charters as a condition of doing business or holding property in the State does not apply."

Neal *v.* New Orleans, &c., Assn., 100 Tenn., 607, 614, 615.

In a similar case decided by the Chancery Court of Appeals of Tennessee and affirmed orally by the Supreme Court of that State on March 2, 1898, it appeared that the trust company, a corporation of Pennsylvania, had no "regular" agent in Tennessee, but loaned money to Tennesseans on applications sent to it by loan brokers in Tennessee "who were the agents of the borrowers." The notes were always payable at Philadelphia. A great many loans were made in this way. A borrower attempting to evade liability on the ground that the corporation had not complied with the Acts of 1891, the Court held that such contracts were not within those acts, since they were payable in another State; and the contracts were enforced. This was done, although the parties had stipulated in the contract that "parties making and receiving the

loan and making the mortgage, contract with reference to the laws of Tennessee."

Norton *v.* Union Bank & Trust Co., 46 S. W. Rep., 544.

The case of *Association* v. *Farrell*, decided by the Supreme Court of Tennessee, but in which no written opinion was delivered, is stated in full in the case of *Norton* v. *Union Bank & Trust Co.* just cited, and that case seems to have been upon all fours with the case at bar. There "the building association had several agencies in this State, and as a matter of fact had a local agency established at Clinton, in Anderson County, Tennessee, where the defendant Farrell resided, and Farrell was a subscriber to the stock of the association through this local agent. Farrell corresponded with the association about a loan for about $5,000. He afterwards went to Louisville, Ky., the office of the association, and according to the opinion of the Supreme Court, there secured the loan for himself. He got $,500 in money, came home, executed a mortgage and sent it to Louisville and got the balance of the money. The note and mortgage were both executed in Tennessee, but the note was made payable in Kentucky. * * * Our Supreme Court held that this was a Kentucky contract, and that it was not doing business within the prohibition of our statute" (46 S. W. Rep., 546).

The case of *Bank* v. *Massengill*, another unreported decision of the Supreme Court of Tennessee, is also reviewed, and stated in the opinion of the Chancery Court of Appeals in the *Norton* case, which opinion, as already stated, was affirmed by the Supreme Court of Tennessee.

Norton Case, 46 S. W. Rep., 546.

The Tennessee case relied on by appellants to negative the foregoing cases is that of *United States Savings Co.* v. *Miller*, 47 S. W. Rep., 17. This was a decision of the Chancery Court of Appeals which was affirmed orally by the Supreme Court on De-

cember 18, 1897. It therefore antedated, by some months, the decision of the same court in *Neal* v. *New Orleans Association*, 100 Tenn., 607, and of *Norton* v. *Trust Co.*, 46 S. W. Rep., 545, both of which cases were determined in the Supreme Court of Tennessee in March, 1898.

While the opinion of the Chancery Court of Appeals in the Miller case contains many dicta that may well be regarded as tending to sustain the contentions of appellants, yet, in view of the subsequent decision of the Supreme Court of Tennessee in the *Neal* case, we do not think that the mere affirmance of the *Miller* case by the Supreme Court should be regarded as an adoption of all of the doctrines stated in the opinion of the Chancery Court of Appeals determining the case below. The point actually decided in the *Miller* case was that the contract in controversy was a Minnesota contract, *because "there was no legal delivery of the bond and mortgage until they reached Minnesota and were approved there"*; and it was further held that the complainant corporation in that case *had sufficiently complied with the foreign corporation laws of Tennessee*, so that its contracts, though made by it in Tennessee while doing business in that State, could be upheld. All else, in the opinion of the Chancery Court of Appeals, must be regarded as the mere "dicta" of the Judge delivering the opinion, and, consequently, the affirmance of that case by the Supreme Court, the case being decided *in favor of the corporation*, and the corporate contract being enforced, cannot be regarded as an acceptance by the Supreme Court of Tennessee of the "dicta" of the learned Judge who delivered the opinion in the Chancery Court of Appeals.

U. S. Savings and Loan Co. *v.* Miller, 47 S. W. Rep., 17, 22-25.

In the *Miller* Case, the effect of the repealing Act of 1895, *supra*, and Chapter 122 of the Acts of 1891, is reviewed, and the Court says: "Having arrived

at this point we next determine that § 1, C. 81, Acts of 1895, supersedes § 2, C. 122 of the Acts of 1891, and that it is not now necessary that any foreign corporation desiring to do business in this State should cause to be registered an abstract of its charter in each of the counties where it desires to do business or to own property, but that it is sufficient that such foreign corporation should file in the office of the Secretary of State a copy of its charter, and that it is 'sufficient to authenticate such copies so filed by the certificate of the secretary or secretaries of such corporations, and by attaching thereto the corporate seal,' this latter clause of § 1, C. 81, Acts 1895, repealing by implication the former provisions upon that subject contained in § 2, C. 31, Acts 1877, above referred to."

And further on in the opinion reference is made to a still later Act of Tennessee, to wit, Chapter 25 of the Acts of 1897: "This Act amends C. 119, Acts 1895. This last mentioned Act provided, in substance, that where foreign corporations doing business in this State have made contracts or purchased property without filing a copy of their charter in the office of the Secretary of State, or without filing an abstract of the same in the Register's office of the counties where they did business, nevertheless such contracts or purchases should be valid, if at the date of the Act such corporation had already complied with the law, or should do so within four months from the passage of that Act. The Act of 1897 (Chapter 25) amended this Act by applying its saving provisions to 'such foreign corporations as in good faith shall before September 9, 1895, have complied with the provisions of Chapter 122 of Acts of 1891, as modified and amended by the provisions of Chapter 81 of Acts of 1895'; that is, to such foreign corporations as had filed a copy of their charter in the office of the Secretary of State. This Act was passed on March 24, 1897. Its purpose was to validate the contracts of such foreign corporations as on September 9, 1895, stood in the

attitude of having complied with Acts 1895, C. 81. On that day, September 9, 1895, the complainant company did stand in that attitude. It then had on file with the Secretary of State a copy of its charter. True, that charter, or copy thereof, was filed in the office of the Secretary of State in 1891, prior to the passage of Acts 1895, C. 81; but that statute was a remedial one, and should be liberally construed; and as the complainant company, at the time that Act was passed, stood in the position contemplated by that Act, it fell, as to contracts thereafter made, clearly within the equity of the statute. It would have been a mere idle form to again file with the Secretary of State a paper already on file with him."

U. S. Savings & Loan Co. *v.* Miller, 47 S. W. Rep., 24, 25.

Now, in view of the fact that Chapter 114 of Acts of 1895, as we have pointed out above, repeals Chapter 2 of the Acts of 1891, passed March 26 1891, and approved March 28, 1891, entitled "An Act to regulate the business of building and loan associations," and Chapter 114 of the Acts of 1893, entitled "An Act to amend Chapter 2 of the Acts of 1891," it is manifest, under the reasoning of the Tennessee Chancery Court of Appeals in the *Miller* case, that by the filing of its charter in August, 1893, appellee complied with the only foreign corporation laws of Tennessee in force at the time of the institution of this suit and necessary to validate its contracts, even if they be treated as contracts made in the State of Tennessee. Hence, appellants' contentions in this case must not only fail because the contracts in question are contracts of the State of New York, but also because, even if contracts of the State of Tennessee, they are valid and enforcible in the Courts of that State.

Neuchatel, &c., Co. *v.* The Mayor, 155 N. Y., 373, 376; overruling the same case, 9 Misc. (N. Y.), cited upon Appellant's Brief.

It is true, that in a Tennessee case earlier than any of the cases heretofore reviewed, the Supreme Court of Tennessee held that it would refuse to enforce a mortgage held by a non complying foreign corporation, but it does not appear from the opinion of the Court where the notes were payable and no point was made in the case that the notes being payable in another State than Tennessee their validity was to be determined by the law of the place of payment. Counsel for the corporation in the *Cannon* case seems to have rested his entire argument on the point that as the borrower had become a stockholder prior to the passage of the Act of 1891, that act could not destroy his vested right to an "advance" nor the right of the corporation to make such "advance" to him. In short, the contention in that case was that the Act of 1891 was unconstitutional, as impairing the obligation of a contract. We understand that in fact the notes in that case were payable in New York, but as the point is not adverted to in the opinion of the Court, the fair presumption is that the Court's attention was not called to the point, and therefore, the *Cannon* case is not an authority in support of the contentions of appellants here; but, so repulsive to their sense of justice was the conclusion that the Judges of the Supreme Court of Tennessee reached in the *Cannon* case, that they eagerly availed themselves of an equity maxim to compel the borrower to repay the amount received by him under the contract which they held invalid.

New York, &c., Building Assn. *v.* Cannon, 99 Tenn., 344, 349, 350.

The doctrines here contended for by the appellee are sustained by recent decisions in the Federal courts.

Sullivan *v.* Sheehan, 89 Fed. Rep., 247.
Lauter *v.* Jarvis-Conklin Mortgage Co., 85 Fed. Rep., 894.

And the Federal courts not being concluded by previous decisions in the State courts construing the statutes in question, are free, in this case, to hold that even if the statutes were not complied with by the appellee, and even if its contracts were Tennessee contracts, yet, nevertheless such contracts are not rendered absolutely void and unenforcible, but, the statutes providing a penalty, that such penalty must be treated as the only punishment that can be inflicted upon appellee for non-compliance with the statutory requirements.

Union Gold Min. Co. *v.* Bank, 96 U. S., 640.

National Bank *v.* Whitney, 103 U. S., 99, 103.

Fritts *v.* Palmer, 132 U. S., 282.

Harris *v.* Runnels, 12 How., 79.

Crefield Mills *v.* Goddard, 69 Fed. Rep., 141; 75 Fed Rep., 818.

Jarvis, &c., Co. *v.* Wilhoit (Tenn.), 84 Fed. Rep., 514.

Union Mut. Life Ins. Co. *v.* McMillen, 24 Ohio St., 67.

Charter Oak Life Ins. Co. *v.* Sawyer, 44 Wis., 387.

2 Morawetz on Corp. (2d Ed.), § 665.

In one Tennessee case, the agent, in Tennessee, of a foreign corporation which had not complied with the Act of '91, was indicted in the criminal court for embezzling money of his principal collected in the course of the "unlawful" business of the corporation within the State. He set up the fact that the corporation, his principal, had not complied with the Acts of '91, as a defense to the indictment. But the Court repudiated any such doctrine, citing an opinion of Mr. Justice Brewer, then a member of the Kansas Supreme Court

State *v.* O'Brien, 94 Tenn., 82.

State *v.* Spalding, 24 Kansas, 1.

The only conclusion at which one can arrive, after an examination of the Tennessee cases, that will harmonize them all is that the Act of '91 was intended to apply only to such foreign corporations as conducted an established business in the State, had an office and place of business and all the machinery for the transaction of its business there.

Thus, in the first case on the subject, it appeared that the corporation, a lumber company, had its lumber yards in Tennessee and conducted a large business there. What business was done was begun and concluded there.

Lumber Co. *v.* Thomas, 92 Tenn., 587.
Milan Co. *v.* Gorton, 93 Tenn., 597.

The Act does not apply to contracts which are merely the winding up of transactions begun before its passage; nor to contracts made or performable in another State; nor to contracts of foreign corporations having no office in the State (appellee had none in Tennessee) and transacting business entirely through soliciting agents and by correspondence, all contracts being closed at the corporate *situs* and not in Tennessee.

Asher *v.* Texas, 128 U. S., 129.
McCall *v.* California, 136 U. S., 104, 110.

We do not, of course, concede on the facts of this case any obligation resting upon appellee to comply with such statutes, or any violation of the statutory provisions by the transactions between appellants and appellee as disclosed by this record. We insist that the contract was a New York contract.

VII.

The second question certified to this Court by the Circuit Court of Appeals is as follows:

"WAS THE VALIDITY OF THE MORTGAGE EXECUTED AND DELIVERED UNDER THE SAME CIRCUMSTANCES TO BE DETERMINED BY THE VALIDITY OF THE NOTES TO WHICH IT WAS INCIDENT, OR BY THE LAW OF THE STATE WHERE THE LAND LAY WHICH THE MORTGATE CONVEYED AND WHICH UPON DEFAULT MUST BE SOLD TO PAY THE NOTES?"

The validity of the mortgage must be determined by that of the notes to which it is incident. We submit this as the correct answer to the second of the questions certified by the Circuit Court of Appeals.

The contention of appellants is, that "if it should be conceded, however, that the notes were valid, still the mortgage is invalid. The mortgage was executed in Tennessee, conveys Tennessee land, and necessarily has to be enforced in Tennessee. If the contract evidenced by the notes be valid, it is upon the theory that they are New York contracts, either because they are payable in New York, or because the notes were accepted by the association in New York. Any liability on the notes is based on the idea that they are beyond the jurisdiction of the State of Tennessee and may not be affected by its laws. Now, the land which is embraced in the mortgage is situated in Tennessee and cannot be withdrawn therefrom either actually or theoretically. The validity of all conveyances of said land is necessarily tested by the laws of the State of Tennessee. This is true whether the mortgagor executes the mortgage in Tennessee

or outside of it. The validity of a contract as to land must be determined by the law of the place where the lands are situated."

Appellants' Brief, pp. 45, 46.

We take issue upon the proposition of law thus stated by appellants' counsel, and, assuming that the notes secured by the mortgage are valid contracts entered into in New York and governed by the laws of that State, we insist that the mortgage securing the notes, no matter where executed, is but an incident to the New York contract, is itself a part of that contract, and, upon constitutional as well as general legal grounds, must be enforced as against the appellants.

Allgeyer *v.* Louisiana, 165 U. S., 578.
St. Louis, &c., R. Co. *v.* Terre Haute Rd., 145 U. S., 393, 405.
Sullivan *v.* Sheehan, 89 Fed. Rep., 247.
West Mass. Fire Ins. Co. *v.* Hilton, 42 App. Div. (N. Y.), 52, 58, 61.

To hold otherwise would be to so construe the statutes of Tennessee against the enforcement of contracts made by foreign corporations with citizens of Tennessee, as to deny all remedy upon such contracts even though valid in the State of performance. Such a denial of remedies is unconstitutional.

Louisiana *v.* New Orleans, 102 U. S., 203, 206, 207.
Edwards *v.* Kearzey, 96 U. S., 595, 603.
Greenwood *v.* Freight Co., 105 U. S, 13.
The Homestead Cases, 12 Am. Rep., 507, 515; s. c., 22 Gratt. (Va.), 266.

Undoubtedly the rule is, that questions affecting the descent, alienation or transfer of real estate must be determined by the *lex loci rei sitæ*. That law must determine what formalities are necessary, the

requisites of execution, acknowledgment, delivery and registration. There is no claim here that the mortgage in form and execution is not in strict compliance with the local laws of Tennessee. The only claim of appellants is that the mortgage is void and unenforcible in Tennessee because given to secure the payment of obligations which they insist were entered into in violation of the laws of Tennessee, and which they say are therefore void.

A conveyance of land is one thing, and a mere pledge of it to secure a debt is another and entirely different thing. This Court has well stated the nature of a mortgage and defined its legal effect: "The property in no sense belonged to the non-resident bondholder or to the mortgagee of the company. The mortgage transferred no title; it created only a lien upon the property. Though in form a conveyance, it was, both at law and in equity, a mere security for the debt. * * * A mortgage being thus a mere chose in action, it only confers on the holder or party for whose benefit the mortgage was given, a right to proceed against the property mortgaged, upon a given contingency, to enforce, by its sale, the payment of his demand. This right has no locality independent of the party in whom it resides."

Case of the State Tax on Bonds, 15 Wall., 300, 322, 323.

And such is the rule in Tennessee: "The mortgagee's interest in the mortgaged land is only a security for the debt, the debt being the principal and the land only an incident, and therefore a sale of the mortgagee's interest in the mortgaged land, under a bill to which the mortgagor was not a party, conveys no title to the purchaser."

McGan *v.* Marshal, 7 Hum. (Tenn.), 122.

In recognition of this rule there are many cases holding that the mortgagor is not liable to account

for rent of the mortgaged premises. Such rents belong to him until foreclosure.

Whitmore *v.* Parks, 3 Hum. (Tenn.), 95.
McCall *v.* Cawthorne, 9 Bax., 61.
Young *v.* Hale, 6 Lea, 182.

Under the Tennessee Statute of Frauds, a writing is required for a transfer of an interest in land, yet, it is held that no writing is necessary for the transfer of a mortgage.

McCallum *v.* Jobe, 9 Bax., 174.

The mortgage passes as a mere incident to the transfer of the notes secured by the mortgage without any special agreement whatever.

Under these authorities then, the appellee, by taking a mortgage on Tennessee land, did not acquire any real property there, and no occasion arises for the application of the *lex loci rei sitæ*. It acquired a mere chose in action, which neither had or could have any *situs* apart from the person of its owner or "any locality independent of the party in whom it resides." It would seem to follow beyond question that the validity of this chose in action must be determined by that of the note to which it was an incident.

"The note which is the basis of this suit was made in Iowa and the contract must be governed by the laws of Iowa."

McCall *v.* Palmer, 116 U. S., 98, 100.

"The legal fulfillment of a contract of loan on the part of the borrower is repayment of the money, and the security given is but the means of securing what he has contracted for, which, in the eye of the law, is to pay where he borrows unless another place of payment be expressly designated by the contract.

Coghlan *v.* South Carolina R. R. Co., 142 U. S., 101, 110.

DeWolf *v.* Johnson, 10 Wh., 367, 383.
Hall *v.* Cordell, 142 U. S., 116, 120.
Mutual Life Ins. Co. *v.* Dingley (C. C. A.), 100 Fed. Rep., 408, 413.

So, in a case involving the construction of these Tennessee statutes by the United States Circuit Court of Appeals for the Sixth Circuit, Lurton, Circuit Judge, who was formerly Chief Justice of the Supreme Court of Tennessee, and who is familiar with the law in that State upon this subject, laid down the rule that "the mortgage to secure this note was a mere security and followed the debt."

Lauter *v.* Jarvis-Conklin Mortgage Trust Co., 85 Fed. Rep. (C. C. A.), 894, 896.

And the same doctrine has been enunciated in other Circuits.

Sullivan *v.* Sheehan, 89 Fed. Rep., 247.
Andruss *v.* People's Building, Loan, &c., Assn. (C. C. A.), 94 Fed. Rep., 575, 580.

Judge Story and Chancellor Kent both reach the conclusion that the locality of real estate has nothing to do with the validity of a note or mortgage upon the ground that the security is merely an incident to the note.

Story on Conflict of Laws (8th ed.), § 287*a*.
Kent, Chancellor, in Van Schaik *v.* Edwards, 2 Johnson's Cases, 366–368.

So, in a recent Tennessee case involving a building and loan association contract, a note was given to complainant, a foreign corporation, secured by a trust deed on Tennessee land. In default of payment, complainant had the trustee sell, and became the purchaser. Defendant re-

fusing to vacate the premises, an action of ejectment was brought against him. The defense was, that the trust deed was usurious on its face, as indeed it was under the Tennessee law. The Supreme Court of Tennessee, however, held that as the notes secured by the deed of trust were payable in Minnesota, they were Minnesota contracts, and, being valid there, were valid everywhere. Complainant was given judgment in the ejectment suit; the Court thereby again indicated that the validity of the trust deed was to be determined by that of the note to which it was an incident.

Pioneer Association *v.* Cannon, 96 Tenn., 599.

Assuming the notes to be valid because payable in New York, there can be no doubt that under numerous decisions of the Supreme Court of Tennessee, the mortgage given to secure such notes is valid and enforcible.

Neal *v.* Building and Loan Assn., 100 Tenn., 607.

Norton *v.* Trust Co., 46 S. W. Rep., 544.

Hubble *v.* Morristown, 95 Tenn., 585.

On the other hand, if the notes to secure which the mortgage was given are invalid and not enforcible, then, no matter how valid the mortgage may be, it cannot be enforced if the notes to which it is an incident are unenforcible.

Am., &c., Mortgage Co. *v.* Jefferson, 69 Miss., 770; S. C., 30 Am. St. Rep., 587.

Armistead *v.* Blythe (Miss.), 20 So. Rep., 298.

Hence, it follows that if the notes in this case are to be governed by the law of the place of payment, namely, the law of New York, then both notes and

mortgage are valid and enforcible, and the courts of Tennessee, both State and Federal, will enforce the mortgage security as being but an incident to the commercial obligation which the notes represent. Any other conclusion would involve the palpable inconsistency of holding the notes valid and the mortgage invalid, a result which has never been reached by any court in any jurisdiction, formalities in the execution of the papers not being involved.

Finally, as controlling upon both the first and second questions certified by the Circuit Court of Appeals, we submit that the Federal courts not being bound by State court decisions, construing the Acts of 1891 at the time the contracts between appellants and appellee were entered into, are at perfect liberty to adopt their own construction of those acts, and we contend that the true construction of those acts is, that as they merely impose penalties for non-compliance, the only liability of appellee, if any violation of the statutes is shown, is to pay the penalty provided by the State statutes in question, and its contracts are not void.

Eastern B. & L. Ass'n *v.* Snyder (Va.), Appendix "B," *post*, p. 153.
Fritts *v.* Palmer, 132 U. S., 282, 288, 289, 291, 292.
National Bank *v.* Matthews, 98 U. S., 621, 627.
National Bank *v.* Whitney, 103 U. S., 99, 103.
Swope *v.* Leffingwell, 105 U. S., 3.
Reynolds *v.* Crawfordsville Bank, 112 U. S., 405, 412.

We do not deem it necessary to review the authorities cited in appellants' brief in support of their contention that the validity of the mortgage in this case as security for the notes payable in New York, is to be determined, even though the validity of the notes be admitted, by the *lex loci rei sitæ* instead of by the *lex loci contractus*. Suffice it to say that all

the cases upon which they rely are cases involving questions of purely local law as to the nature, validity and execution of instruments conveying the title to real estate. A recent conspicuous example of cases of this nature is afforded by the case of *DeVaughn* v. *Hutchinson*, 165 U. S., 566. In that case this Court held that the meaning, application and effect of the rule in Shelley's case must be determined by the law of the State where the land lay, because it was a rule of property, but, when there is no question of this character involved and the inquiry is merely whether a pledge of land by mortgage is valid, notwithstanding a State statute prohibiting the mortgagee, a foreign corporation, from "doing business" in the State, the rule should be, as we contend, that the validity of the mortgage must be tested by the validity of the notes, and if they are valid and enforcible, the mortgage securing them is likewise valid.

VIII.

The third question certified to this Court by the Circuit Court of Appeals is as follows:

"MAY A STATE BY ITS LAWS FORBIDDING THE TRANSACTION OF BUSINESS WITHIN ITS BORDERS, ANNUL THE CONTRACTS OF ITS CITIZENS, ENTERED INTO AND TO BE PERFORMED WITHOUT THE STATE, WHEN THOSE CONTRACTS ARE BUT THE CONSUMMATION OF THE INHIBITED BUSINESS WITHIN THE STATE, WITHOUT AN INFRACTION OF THE XIVTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES."

Appellants contend that the United States Circuit Court of Appeals in this question did not mean "to intimate that the contracts in question were technically 'entered into' in New York," and they add, "we also, in this connection, again, insist that even if the contracts were technically closed in New York,

that they were made in the course of, and as a part of, a general business admittedly carried on by the Eastern Building and Loan Association in Tennessee, which business was forbidden by Tennessee law. This illegal business cannot be made practically legal by having all the contracts made therein closed outside of the State of Tennessee. To so hold, seems to us to sanction a plain evasion of the Tennessee laws. By such a decision, all laws attempting to control foreign corporations are practically destroyed."

Appellants' Brief, p. 49.

Our answer to the third question certified and to the foregoing contention of appellants' counsel is, that the Tennessee statutes must be held unconstitutional if it is necessary to construe them as by their terms invalidating contracts made in New York and to be performed in that State.

The question certified by the Circuit Court of Appeals assumes as a premise that these contracts were both made and to be performed in New York, and we shall discuss the question here on the assumption that this premise is correct and that we have demonstrated it to be so upon the facts shown by the record in this case.

Ante, pp. 56–66; 96–99, fols. 170–198.

The question is not whether the State of Tennessee may close the doors of its courts to corporations violating its laws, or whether the State may refuse to allow the process of its courts to be used in aid of contracts made in violation of its laws.

This it clearly may do in proper cases.

Tioga R. *v.* Blossburg, &c., R. Co., 20 Wall, 137.

Story *v.* Ills. Cent. R. Co., 116 U. S., 347.

Doyle *v.* Ins. Co., 94 U. S., 535.

But doubtless the State of Tennessee must observe those rules of constitutional obligation which require it to give full faith and credit to the laws and judi-

cial proceedings of its sister States and to pass no laws impairing the obligation of contracts.

Const. U. S., Art. IV., § 1.

New York, L. E., &c., R. Co. *v.* Pennsylvania, 153 U. S., 628.

Nor can it deny to any person within its jurisdiction "due process of law" and the equal protection of the laws. Upon this question we have already sufficiently collected the authorities.

Ante, pp. 91–94.

But this case was instituted in the Circuit Court of the United States by a bill in equity, and, consequently, no question as to the authority of the Legislature of Tennessee to close the doors of its courts to appellee is involved.

Sullivan *v.* Beck, 79 Fed. Rep., 200.

The question is whether the power of the State of Tennessee with reference to foreign corporations extends so far as to authorize or empower it to annul by legislative action the contracts of such corporations, made and performable beyond its borders. It is a question as to whether the State of Tennessee may say that neither a Federal court nor, indeed, a New York court shall enforce the performance of a contract made in New York and performable there, merely because the obligor in such contract is a citizen of Tennessee. To state the question is to answer it. The assumption that the contract was both entered into and to be performed in New York compels the conclusion that the corporation, in completing such contract by its acceptance thereof in New York, was not acting in that instance within the territorial jurisdiction of Tennessee, nor within its legislative control. It makes no difference how many times appellee may have violated the laws of Tennessee by entering into contracts within that State in violation of its statutes, provided it did not violate them in that respect in this instance.

Norton *v.* Trust Co., 46 S. W. Rep., 546.

The reason and the purpose of the Tennessee Act of March 26 and 28, 1891, Chapter 2, are not apparent upon the face of the act.

Appellants' Brief, Appendix, pp. 76-81.

This act, which was the only act with which appellee had not complied at the time of the institution of this suit, was, as we have already pointed out, itself repealed by the Legislature of Tennessee prior to the beginning of this suit.

Acts of Tennessee, 1895, Ch. 114.
Ante, pp. 110, 111; 115-117.

The true object and purpose of the act in question, as suggested by Judge Hammond, seems to have been to secure fees for State officers. It was an act "for revenue only," and the responsibility for its existence lay in the fact that Tennessee officers were then paid in fees. There is nothing in the character or purpose of the act which makes it a proper exercise of the "police power" of the State.

Bedford Case, 88 Fed. Rep., 11; *ante*, p. 29, fol. 85.

We have already conceded the rule to be that a State corporation not engaged in interstate commerce cannot carry on or "do business" in a State other than that of its corporate *situs*, except by the consent of such other State, either expressly given or implied upon principles of interstate comity.

Ante, p. 80.
Hooper *v.* California, 155 U. S., 648, 652.
Waters-Pierce Oil Co. *v.* Texas, 177 U. S., 28, 46.

In view of this concession, it is unnecessary to review the numerous authorities which appellants' counsel cite upon their brief to support it. But the proposition submitted by the Circuit Court of Appeals in the third question certified is different from this, and involves only the right of a State, by its legislation, to "annul the contracts of its citizens entered into and to be performed without the State," merely because those contracts are but the consum-

mation of business forbidden to be transacted in the State by the foreign corporation with which its citizens contract in the State of the corporate *situs*.

Our insistence is that such legislation as this is necessarily in contravention of the XIVth Amendment to the Constitution of the United States.

We have already argued at length the proposition that the transactions between appellants and appellee constituted interstate commerce and are beyond the reach of State regulation or prohibition.

Ante, pp. 84-91.

Apart from that question, we insist that the Tennessee statutes, if given the construction for which appellants contend, would interfere with that liberty of contract which the XIVth Amendment to the Constitution of the United States guarantees, and that the effect of the statutes at the same time would be not only to impair the obligation of a contract, but to deprive the appellee of "due process of law" by preventing it from enforcing in the courts of the United States in Tennessee, a contract made in New York, outside the jurisdiction of Tennessee, and as a mere incident to which mortgage security upon Tennessee property was given. That statutes having such consequences as these are invalid and unconstitutional, seems to be settled law.

Allgeyer *v.* Louisiana, 165 U. S., 578, 586, 588, 589.

Powell *v.* Pennsylvania, 127 U. S., 678, 684.

New York, L. E., &c., R. Co. *v.* Pennsylvania, 153 U. S., 628.

The power of a State to regulate the contracts of foreign corporations or the contracts between its citizens and foreign corporations "does not and cannot extend to prohibiting the citizens from making contracts of the nature involved in this case outside of the limits or jurisdiction of the State, and which are also to be performed outside of such jurisdiction; nor can the State legally prohibit its citizens from

doing such an act as writing this letter of notification, even though the property which is the subject of insurance may at the same time when such insurance attaches be within the limits of the State. The mere fact that a citizen may be within the limits of a particular State does not prevent his making a contract outside its limits while he himself remains within it."

Allgeyer *v.* Louisiana, 165 U. S., 578, 591, 592.
Tilden *v.* Blair, 21 Wall., 241.
Milliken *v.* Pratt, 125 Mass., 374.

The contract in this case was thus made. It was a valid contract made outside of the State, to be performed outside of the State, although the property, the mortgage upon which was given as security for the payment of the notes in New York, was within the State of Tennessee. As the contract was valid in the place where made and where it was to be performed, no State legislation can be permitted to impair its obligation or prevent its enforcement.

Allgeyer *v.* Louisiana, 165 U. S., 592.

The XIVth Amendment to the Constitution of the United States "undoubtedly intended not only that there should be no arbitrary deprivation of life or liberty, or arbitrary spoliation of property, but that equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights; and that all persons should be equally entitled to pursue their happiness and acquire and enjoy property; *that they should have like access to the courts of the country for the protection of their persons and property, the prevention of wrongs and the enforcement of contracts.*"

Yick Wo *v.* Hopkins, 118 U. S., 356, 367.
Santa Clara Co. *v.* South. Pac. R. R., 118 U. S., 394, 396.

In other connections, we have already reviewed the authorities in support of the answer which we think should be made by this Court to the third question submitted for determination by the Circuit Court of Appeals, and to that discussion and to those authorities we refer.

Ante, pp. 91–95.

We have no doubt that the *Allgeyer* case is a controlling authority upon this question, because the facts of this case and the premises assumed in the question certified and which we are now considering, brings this case directly within the principle of the decision in the *Allgeyer* case.

Ante, pp. 92, 93.

Most, if not all, of the cases cited and relied upon in appellants' brief upon the question now the subject of discussion are inapplicable, because they do not involve the proposition that the contracts were "entered into and to be performed *without the State*" and were valid and legal contracts in the State where they were entered into and were to be performed.

IX.

The fourth question certified to this Court by the Circuit Court of Appeals is as follows:

"EVEN IF A STATE MAY BY LAW REFUSE ENFORCEMENT OF SUCH A CONTRACT IN ITS COURTS, SHOULD A CIRCUIT COURT OF THE UNITED STATES SITTING IN THE STATE REFUSE TO ENFORCE IT WHEN JURISDICTION OVER THE PARTIES EXISTS BY REASON OF THEIR DIVERSE CITIZENSHIP?"

In discussing this question, appellants in their brief say: "The courts, of course, have nothing to do with the policy of the laws of Tennessee in ques-

tion," and their insistence is, that "it is perfectly well settled that any State has the right to exclude any foreign corporation from transacting business within its limits, and that any terms can be imposed upon a foreign corporation seeking to do business within the State that the State sees fit to impose."

Appellants' Brief, p. 56.

This is a mere begging of the fourth question certified by the Circuit Court of Appeals That question presents to this Court for its determination the proposition whether if a State by its laws forbidding the transaction of business within its borders, annuls the contracts of its citizens entered into and to be performed without the State, the courts of the United States are open to secure the enforcement of such a contract when jurisdiction exists by reason of the diverse citizenship of the parties.

The answer to this question, both upon principle and authority seems to be very clear. Under the Constitution of the United States the courts of the United States are open to suitors having the requisite diversity of citizenship, when the requisite amount in controversy appears, and no State statutes can limit, hinder or control the exercise of this jurisdiction.

Arrowsmith *v.* Gleason, 129 U. S., 86, 99.

Smyth *v.* Ames, 169 U. S., 466, 516, 517.

Clark *v.* Bever, 139 U. S., 96, 102, 103.

Sullivan *v.* Beck, 79 Fed. Rep., 200.

So far as the contention of appellants' counsel that the courts of the United States are bound in this case to follow the construction of the State statutes, adopted by the State courts, is concerned, it is only necessary to repeat that the question involved is one in which, under the circumstances, the Federal courts will adopt their own views without being concluded by the decisions of the State courts.

The contracts here in question were either made before, or, as to part of them, just after the passage of the Acts of 1891, but long before the Supreme Court of that State had announced its construction of those acts. The acts were passed in March, 1891. The notes and mortgage were executed within three months thereafter, while the first decision of the Supreme Court of Tennessee, construing the statutes, was rendered May 20, 1893. (Lumber Co. *v.* Thomas, 92 Tenn., 587.) In such cases it has always been the rule that a Federal court, while giving much weight to the opinions of the State court, will still determine for itself the true construction of statutes applicable to contracts which were entered into before the State court construction was promulgated.

Burgess *v.* Seligman, 107 U. S., 20.

Anderson *v.* Santa Anna Township, 116 U. S., 356.

Trust Co. *v.* Cincinnati (C. C. A.), 76 Fed. Rep., 296.

Speer *v.* Byrd (C. C. A.), 88 Fed. Rep., 789.

In a recent case involving the Virginia coupon question, this Court held that (quoting the language of Mr. Justice Wayne in *Bank* v. *Skelly*, 1 Bl, 443): "It has never been denied, nor is it now, that the Supreme Court of the United States has an appellate power to revise the judgment of the Supreme Court of a State whenever such a court shall adjudge that not to be a contract which has been alleged in the forms of legal proceedings by a litigant to be one within the meaning of that clause of the Constitution of the United States which inhibits the States from passing any law impairing the obligation of contracts. * * * It never was intended, and cannot be sustained by any course of reasoning, that this Court should or could, with any fidelity to the Constitution of the United States, follow the construction of the Supreme Court of a State in such a matter when it entertained a different opinion."

McCullough *v.* Virginia, 172 U. S., 109.

The decision of the Tennessee Supreme Court in 1893, if given the effect appellants claim for it, will operate to impair the obligation of contracts made long before. The decision accomplishes this by a forced construction of a statute passed about the time these contracts were made. And we now insist that the statute did not operate to destroy or invalidate these contracts, but that the erroneous construction of the statute does so operate.

Under this condition of affairs, it seems the rule announced in the Virginia coupon case, quoted *supra*, should apply.

Assuming that a Circuit Court of the United States, sitting in Tennessee, should be of the opinion that the construction placed on these statutes by the State Supreme Court was erroneous, and that these acts did not invalidate contracts made by a foreign corporation which had not complied with them, it cannot be doubted that such a court, having jurisdiction by virtue of the diverse citizenship of the parties, would have the power to uphold and enforce such contracts.

The position taken by the learned Judge who first tried this case, that the Federal courts will enforce such contracts, notwithstanding the ruling of the State court, is supported by two Federal cases.

Sullivan *v.* Beck, 79 Fed. Rep., 201.

Farmers' L. & T. Co. *v.* Railroad, 68 *Ibid.*, 417.

In this latter case, which was a proceeding by a trust company to enforce a trust, the claim was made that the trust company had not complied with the statute for the protection of the *cestuis que trustent*, the Court said: "It may be that the Courts of the State of Illinois would refuse to recognize the trustee standing in defiance of its laws I do not think, however, that the duty is imposed upon Federal courts to punish innocent parties in vindication of the authority of the State."

X.

APPELLANTS ARE ESTOPPED TO CONTEST THE VALIDITY OF THESE NOTES AND THE MORTGAGE GIVEN TO SECURE THEIR PAYMENT, FOR THE FOLLOWING REASONS:

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1. It was their voluntary act, their insisting upon a contractual right, that brought about this loan. Without dwelling at length upon this point, we say that the dealings with appellants were at the outset valid. Upon the passage of the Act of 1891 the power of appellee to go further was, so appellants contend, at an end, but appellants insisted upon a completion of the transaction, and such completion necessitated the notes and mortgage. Their action in thus insisting upon the carrying out of the whole contract estops them from denying the validity of the latter part of it. Here is a series of interdependent agreements. Appellants cannot select such portions as confer a benefit on them and at the same time repudiate the remaining portions which constitute the consideration due from them.

2. Having received and used appellee's money with full knowledge (implied if not actual) of appellee's alleged incapacity to contract in Tennessee, appellants are estopped to set up that incapacity as a defense here.

State *v.* O'Brien, 94 Tenn., 82.

Where a party deals with a corporation with implied knowledge of its incapacity to contract he is estopped when sued on his contract to deny its validity, particularly where he has received the benefits arising from the agreement.

Cowell *v.* Springs Co., 100 U. S., 55.
Hasselman *v.* Mortgage Co., 97 Ind., 365.

"The principle is well settled that a creditor who has confirmed a fraudulent deed by receiving a ben-

efit under it, or has become a party to it, is estopped from afterwards impeaching it."

Williams *v.* Gideon, 7 Heisk. (Tenn.), 621.

Steam Navigation Co. *v.* Weed, 17 Barb. N. Y., 378.

A corporation may recover on a promissory note given for the repayment of money loaned by it, although it may have exceeded its powers in making the loan and violated a positive law.

Gold Mining Co. *v.* Bank, 96 U. S., 640; 27 Am. & Eng. Ency. of Law, pp. 363-367.

3. Appellant was a member of the association at the time the Act of 1891 was passed, and he is therefore estopped to contest the validity of a proceeding by the association, in which he participated. Appellee, like all similar associations is a co-operative institution. Appellant was a member and a part of it. If there was any illegality in the transactions of the association in Tennessee he was *particeps criminis* and shared the benefits. He cannot now be heard to say that an act in which he participated and in the profits of which he shared was invalid.

Eaton *v.* Aspinwall, 25 N. Y., 122.

Stockholders dealing with their corporation cannot defeat their contracts by alleging that it was a foreign corporation and had not complied with the State laws.

Kilgore *v.* Smith, 122 Pa. St., 48.

In discussing this question of estoppel, we have gone on the assumption that the contracts of foreign corporations failing to comply with the Acts of 1891 are, at the worst, not void, but merely non-enforcible. They may, like contracts barred by the Statute of Limitations, form the consideration for a new agreement. They are valid until disaffirmed by the party sought to be charged. They are enforcible in the hands of an innocent purchaser. And they will

not be set aside or canceled except upon the borrower's doing equity.

This is a correct assumption, without regard to the contested question as to whether the Acts of 1891 directly prohibit the enforcement of such contracts.

Lauter *v.* Mortgage Co., 85 Fed. Rep., 94.
Cæsar *v.* Capell, 83 Fed. Rep., 403.
N. Y. Assoc. *v.* Cannon, 99 Tenn., 344.

The only answer which appellant Bedford seems to make to this argument of estoppel is this: He gives his deposition, in which he swears that he was utterly ignorant of the law relating to foreign corporations and of the association's failure to comply with that law; that he learned of these several years later, when his counsel in this case informed him.

Transcript, p. 92, par. 116.

Col. Bedford was highly educated; was graduated at Lebanon, Tenn., as a bachelor of laws and actually practiced. He admits having heard of the maxim "*ignorantia legis*, &c." His contention cannot be taken seriously.

Upton *v.* Tribilcock, 91 U. S., 45, 50.

It should be noted here that the conditions imposed upon foreign corporations were that they should register their charters in every county in which they did business. It was therefore a matter of record as to whether or not these conditions had been performed, and appellants were therefore chargeable with notice of the fact that appellee had not complied with the act at the time the "advance" to Bedford was consummated.

XI.

THE CONTRACT BETWEEN APPELLANTS AND APPELLEE WAS NOT USURIOUS UNDER THE LAWS OF NEW

YORK REGULATING THE CONTRACTS OF BUILDING AND LOAN ASSOCIATIONS, AND AS THE CONTRACT MUST BE CONSTRUED IN ACCORDANCE WITH THE ARTICLES OF ASSOCIATION AND BY-LAWS OF APPELLEE AND THE LAWS AND JUDICIAL DECISIONS OF NEW YORK, THE FACT THAT SUCH A CONTRACT WOULD BE HELD USURIOUS IF MADE IN TENNESSEE, IS IMMATERIAL, AND THE COURT BELOW CORRECTLY ENFORCED THE CONTRACT ACCORDING TO ITS TERMS.

Counsel for appellants, in their brief, contend that "if the transactions in question were otherwise legal, the loan was usurious. In making the loan at $4,600, Bedford was required to pay a fixed premium of $460 and received only $4,140. Receiving a fixed premium for a loan of money (they say) is usury in Tennessee and in most of the States."

They further insist that "if the Eastern Building and Loan Association by its charter or the laws of New York was allowed to loan money upon fixed premiums, or to loan to members while excluding them from participation in profits, and was allowed to exclude all uncertainty and contingency by maturing the stock at a fixed time, yet it could not do this in carrying on business in Tennessee, as the Tennessee law did not allow this. The whole contract was permeated with usury, as 5 per cent. 'premium,' alias for interest, and 5 per cent. interest were charged in addition to the fixed premium of $460." And, finally, they say that "when it is remembered that the stock issued to Bedford matured at a fixed time, that he was to pay a fixed sum, and that he was forced to withdraw his stock and receipt in full, it is evident that the transaction was not in accordance with the principles applicable to building and loan associations and that the transaction should be treated as a plain loan of money."

Appellants' Brief, pp. 67, 69.

We have already pointed out that appellant Bedford did not "withdraw" his stock in the technical

sense of that term, but merely assigned and pledged it to appellee as collateral security for the "advance" to him under and in pursuance of the usual custom of appellee in such cases and its articles of association and by-laws.

Ante, pp. , fol. 75.
Transcript, pp. 33, 34; Deposition D. A. Pierce, Ans. to Interrogatory 20.

It is a settled law in this court, that if a rate of interest called for in a contract is permissible under the law of the State where the contract is to be performed, there is no usury.

Andrews *v.* Pond, 13 Pet., 78.
Cockle *v.* Flack, 93 U. S., 344, 347.
Miller *v.* Tiffany, 1 Wall., 298, 310.
Scotland County *v.* Hill, 132 U. S., 107, 217.

The Supreme Court of Tennessee has expressly decided, and such, of course, is the general rule, that the usury laws of Tennessee can have no extra-territorial effect.

Pioneer Assn. *v.* Cannon, 96 Tenn., 599.

Assuming, therefore, that the contract between appellants and appellee, under which the "advance" to appellant Bedford was made, are to be construed under the laws of New York, we find that the New York statutes under which the appellee was organized, contain the express provision: "Nor shall the imposition of fines for non-payment of dues or fees or other violation of the Articles of Association, nor shall the making of any monthly payment required by the Articles of Association, *or of any premiums for loans made to members*, be deemed a violation of the provisions of any statute against usury."

Laws of New York of 1851, Ch. 122, § 7; quoted, *ante*, pp. 50, 51, fols, 147, 148, 149.
Laws of New York of 1875, Ch. 564.

Construing this clause of the Act of 1851, the Court of Appeals of New York says: "The taking of a premium in such case is sanctioned by the Act of 1851 as amended by Chapter 564 of the Laws of 1875, and does not render the loan usurious."

Concordia Savings, &c., Assn. *v.* Reed, 93 N. Y., 474, 479.

The Supreme Court of Pennsylvania, passing upon a contract between the appellee and a citizen of Pennsylvania, identical in terms and method of execution with the one under consideration here, has held that: "A contract made by a resident of one State, who applied to become a member of a loan association situated in another State, to pay it money at the place of its residence is to be governed by the law of the latter State as to usury, although the contract was made through an agency situated within the State of the residence of such member and the payment of the money is secured by mortgage on land therein."

Bennett *v.* Eastern B. & L. Assn., 55 Am. St. Rep., 723; s. c. 177, Pa. St., 233.

It is true that in certain cases cited by appellants' counsel on their brief, doctrines contrary to the foregoing rule seem to have been enunciated by the courts of several States (Falls *v.* United States, &c., Co., 97 Ala., 417; Rhodes *v.* Missouri, &c., Co., 173 Ill., 621; Maroney *v.* Association, 116 N. C., 882; Followed in McIlwain *v.* Isely, 96 Fed. Rep., 68) But the Supreme Court of Tennessee has conclusively settled the proposition, so far as that State is concerned, that contracts between the appellee and its stockholders in Tennessee are to be construed in accordance with its Articles of Association and by-laws and the laws of the State of New York.

Miller *v.* Eastern B. & L. Assn., 53 S. W. Rep., 231; "Affirmed orally by Supreme Court, October 14, 1899" (53 S. W. Rep., 231, 234).

And we do not believe that this Court will give its sanction to the untenable doctrines laid down in the Illinois, North Carolina and Alabama cases, upon which appellants largely rely. Those decisions are against equity and good conscience and are in violation of that provision of the Constitution of the United States which requires that full faith and credit shall be given to the laws and judicial proceedings of each State by the courts of every other State.

Const. United States, Art. IV., § I.

This requirement is not a matter of mere comity between the States, but, as Judge Cooley phrases it, it "becomes a rule of Constitutional obligation."

Cooley's Constitutional Law (3d ed.), 203.

And so it has been held by this Court many times.

Huntington *v.* Attrill, 146 U. S., 657.

Gt. West. Tel. Co. *v.* Purdy, 162 U. S., 329, 334.

The charter of incorporation of the appellee expressly authorizes loans or advances to members upon the exact basis that was adopted in the case at bar.

Ante, p. 56, fols. 167, 168.

Transcript, p. 47.

Appellants lay much stress upon the proposition that they were required to pay a "fixed" premium, but the fixing of such a premium being authorized by the Articles of Incorporation of the appellee, has been held to be in strict accordance with the laws of New York.

Eagle Savings & Loan Co. *v.* Samuels, 43 App. Div. (N. Y.), 386, 388.

We have heretofore pointed out that the contracts between appellants and appellee are in strict accordance with the charter of incorporation of the appellee and the laws of New York, and have there cited numerous cases in support of this contention.

Ante, pp. 77, 78.

So far as appellant's proposition, quoted above, that the contract of appellants with appellee involved only a fixed and definite number of payments is concerned, it has been met and disposed of in a number of recent cases in the Courts of New York and elsewhere, to which the appellee was a party or by which it is bound.

House *v.* Eastern B. & L. Assn., 52 App. Div. (N. Y.), 163.

Heslin *v.* Eastern B. & L. Assn., 28 Misc. (N. Y.), 376.

O'Malley *v.* People's Assn., 92 Hun (N. Y.), 572.

Miller *v.* Eastern B. & L. Assn. (Tenn.), 53 S. W. Rep., 231.

The same doctrine laid down in these cases has just been adopted and followed by the Supreme Court of Appeals of Virginia in the case of Campbell *v.* Eastern B. & L. Assn. (not yet reported), in which the opinion of that learned Court was delivered on December 6, 1900, by Harrison, Judge. The opinion in question is so thorough and careful and the conclusion reached so much in point here that we print the opinion in full by way of an appendix to this brief.

Campbell *v.* Eastern, *post*, p. 147.

XII.

APPELLANTS' CONTENTION THAT THE DECREE OF THE TRIAL COURT, RENDERING JUDGMENT AGAINST MRS. BEDFORD, ALTHOUGH SHE IS A MARRIED WOMAN, AND DID NOT SIGN THE NOTES TO APPELLEE, CANNOT BE CONSIDERED IN THIS COURT, FOR THE REASON THAT THERE WAS NO ASSIGNMENT OF ERROR COVERING IT UPON THE APPEAL FROM THE CIRCUIT COURT TO THE CIRCUIT COURT OF APPEALS.

The first two assignments which are alleged by appellants' counsel to cover the point are mere de-

murrers to the decree, and fail to point out the distinction made upon this point in appellants' brief.

Transcript, p. 116.
Van Gunden *v.* Iron Co., 52 Fed. Rep., 838.
Railroad Co. *v.* Cutting, 68 Fed. Rep., 586.
Doe *v.* Mining Co., 70 Fed. Rep., 455.

"An assignment cannot be good under this rule (No. 11), if it is necessary to look beyond its terms to the brief for a specific statement of the question sought to be presented."

Grape Creek Co. *v.* Trust Co., 63 Fed. Rep., 891.

As any discussion by us of the merits of the alleged error in the decree against Mrs. Bedford might be a waiver of the point that there was no assignment of error under which it could be presented to the Circuit Court of Appeals, and therefore that it cannot be presented here, we forbear further comment upon this point.

Regretting the length to which this brief and argument have extended, and offering as our only excuse for such apparent prolixity the novelty and great importance of the questions involved in this case, and the extent of the appellants' brief, we now leave this case in the hands of this Court for final determination.

Respectfully submitted,

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APPENDIX "A."

Supreme Court of Appeals of Virginia.

CAMPBELL v. EASTERN BUILDING AND LOAN ASSOCIATION OF NEW YORK.	RICHMOND, December 6, 1900.

OPINION BY JUDGE GEORGE M. HARRISON.

The appellant being the holder of fifty-eight shares of the capital stock of the Eastern Building and Loan Association, applied for and obtained from said association an advance or loan upon his stock of $5,800. As security for this loan the stock was pledged as collateral, and a deed of trust given by appellant, upon certain real estate. This deed secures the payment of $6,849.34, evidenced by seventy-six promissory notes of even date with the deed, each for the sum of $91.84, except the three maturing last, which are for $48.34 each, all payable to the association at its home office in Syracuse, N. Y., and falling due, one, on the last Saturday of each succeeding month, until all are paid, being the dues on the stock and the interest and premium on the loan. The appellant paid the notes as they fell due down to and including that due on the last Saturday in November, 1898, when the payments ceased, leaving unpaid several of the notes. In December, 1898, the appellant instituted this suit praying that the contract be rescinded; that the defendant association be enjoined from collecting any further sums by reason of the

transaction; that it be compelled to cancel and deliver to appellant the five notes remaining unpaid; to cancel and destroy the certificates of stock; to wholly release and cancel the deed of trust, and repay to appellant the sum of $1,069.60, which represented the amount paid to the association in excess of the loan and six per cent. interest.

Conceding that the demurrer to the bill was properly overruled, and proceeding at once to the merits of the case, we will consider, in the order stated in the petition for appeal, the grounds therein alleged in support of appellant's right to the relief asked.

It is contended that the parties entered into a definite contract, whereby it was agreed that the entire debt should be discharged and paid off in seventy-eight monthly installments; that if this agreement was a mistake on the part of the association, such a mistake releases the appellant, and entitles him to a rescission of the contract upon repayment by him of the money which he received, with six per cent. interest thereon. And that if the association is released from the agreement, because it had no power to make such a contract, the appellant is also released and entitled to a restoration of the *status quo*.

It is not denied that the contract in question was a New York contract, and to be construed in accordance with the laws of that State.

We are unable to distinguish this case, in principle, from the case of Building Association *v.* Tinsley, 96 Va., 322. In that case, the loan was for a definite fixed period of eight years, the borrower undertaking to pay the interest and premiuns thereon in monthly installments; this he did for more than four years, when he ceased paying, and brought suit seeking to be released from his contract upon the ground that the loan was usurious. Following the decision of the Supreme Court of New York, in the case of O'Malley *v.* Building Association, we held that the association did not possess the power to issue a certificate specifying a

fixed period for the maturity of its stock, and that such a clause in the certificate should be construed as an estimated period of maturity; that if the borrowing member had complied with all the rules and regulations of the association, and fully kept his contract during the entire eight years, in which it was estimated that his stock would mature, and had then demanded payment, *he would only have been entitled to receive what his stock had then earned.*

The terms and conditions expressed in the certificates of stock, in connection with the application for membership, and the by-laws of the association form the contract between the association and each shareholder therein. The deed of trust given by appellant expressly provides that the loan in question was made pursuant to and accepted under the provisions of the by-laws which were thereby made a part of the contract, and appellant further covenanted and agreed therein that he would keep and perform all promises and engagements made and entered into with the association according to the true intent and meaning of its by-laws and articles of incorporation.

The contention of appellant throughout is based upon the theory that he is an ordinary borrower of money, ignoring the fact that he is a member of a mutual association, into which he has voluntarily entered, and bound by its articles and by-laws, which constitute part of his contract, and must therefore be given their proper effect in construing that contract. The members of the association have united together in a business venture for the common benefit. It is a mutual association and equality of right according to the interest of each member is the fundamental idea upon which it rests. The definite contract was made doubtless in good faith by both parties, but appellant had no legal right to rely upon such a consummation, he was taking chances with his fellow shareholders that the earnings would be sufficient, in the time specified, to declare, not his alone, but all

the stock matured. At the end of the seventy-eight months, if the stock had not matured, each shareholder could receive what his stock had then earned, or he could go on paying until it did mature. Appellant occupied no better or different position, as a borrower, than the mere holder of stock. He remained a member of the association, the money advanced being upon his stock at its maturity or par value. He had fifty-eight shares and was advanced $5,800. It was never contemplated that he should return the $5,800, but it was the intention and purpose of the contract, that he should continue to pay the dues on his shares, and the interest and premium on the advance, until his stock was matured which would cancel the $5,800.

If the contention of the appellant should prevail it would be at the expense of his fellow stockholders, and if each stockholder should demand settlement upon a like basis, it would thwart the scheme and purpose of the association and probably bankrupt it.

It is further contended that appellant is entitled to a rescission of his contract upon the ground that he was induced to become a purchaser of the stock, as a basis of the loan or advance subsequently secured, by fraudulent misrepresentations made by the agents of the association, as to the time when the stock would mature; that but for such representations of material existing facts, he would not have purchased the stock.

As we have already seen, the association itself had no power to guarantee that the stock would be matured in a fixed time, and therefore its agents could not, if they had attempted to do so, bind it by such representations or guarantees. And further, the agents had no power or authority to bind the association by the statements or representations relied on, for the reason that the certificate of stock, the terms of which appellant must be presumed to have known, as well as the by-laws, and the printed literature, which was in the hands of appellant, all expressly provided that no agent had authority to

change the contract in any way, and that the association assumed no obligation for any statements not contained in its printed literature.

A misrepresentation, the falsity of which will afford a ground of action for damages, or a bill for the rescission of a contract, must be as to an existing fact. It must be an affirmative statement of some fact, in contradistinction to a mere expression of opinion, which is ordinarily not presumed to deceive or mislead (Watkins *v.* Wytheville, &c., Co., 92 Va., 1: Max Meadows, &c., Co. *v.* Brady, *Id.*, 71). So far as the representations made in the printed literature are concerned, for reasons already stated, these are not sufficient to entitle appellant to rescind the contract. As to the representations touching the business of the company, they were merely to the effect that judging from its success in the past (it had only been in business a few months), the business would continue to grow to such an extent that the association would be able to fulfill its promise to close up the contract within seventy-eight months. There was no representation of a definite rate of earnings made by the company, upon which any calculation could be made to test the accuracy of this statement. It was the opinion of the agent, based upon speculations and business contingencies running far into the future, that the end desired by all would be realized. They were not affirmative statements of an existing fact such as the law requires, to entitle appellant to the relief asked.

Apart, however, from these considerations it is too well settled to need citation of authority, that where a party intends to repudiate a contract on the ground of fraud, he should do so as soon as he discovers the fraud; for if after the discovery of the fraud he treats the contract as a subsisting contract, he will be deemed to have waived his right of repudiation, and must then bring an action for damages for the deceit. And whenever a party to a contract has a right to elect whether he will avoid it or treat it as a subsisting contract, his elec-

ion may be manifested by acts as well as by words, and, when once made, is final, and cannot be retracted (Max Meadows, &c., Co. *v.* Brady, *supra*). It appears from the record that in March, 1898, appellant was informed by an agent of the company that the stock would not be matured in the time specified, and that twenty-eight more monthly installments would be required; and shortly thereafter received from the company its annual report, giving him the same information; whereupon he wrote to the company for a statement of what he owed under his contract; and received in reply a statement showing his indebtedness, based upon the additional monthly payments necessary to mature the stock. Notwithstanding all this clear and authoritative information on the subject, he took no action, but continued to pay his monthly installments until the following November, thus making nine several payments after full knowledge of the facts now relied on as ground for rescission. This was a ratification of the right to demand the additional installments that disentitles appellant to the relief now sought. He says he continued to make the payments, because he thought that, in any event, he would have to perform the obligation into which he had entered; and yet in his bill he asks that $1,069.60, a sum more than sufficient to cover the payments thus made, be refunded to him.

The final contention of appellant is that, if he was under an obligation to continue his payments beyond the seventy-six notes given by him for dues, premium and interest, then the contract is an indefinite one, and void for uncertainty. This position has been sufficiently answered by what has been already said. The company had no power to make anything but an indefinite contract, so far as the time when its stock would mature was concerned. To hold the contract invalid for this reason, would be to hold that all subscriptions to the stock of a building association, when the time for the maturity of the stock was not certain and fixed,

were invalid, whereas the contrary is the settled law governing in the construction of such contracts.

The learned counsel for appellant has commented in strong terms upon the harshness of the contract in question; so long, however, as such associations are permitted to do business in the State, and persons are found willing to embark in the enterprise, by becoming shareholders therein, the courts have no alternative but to enforce the contracts they are authorized to make.

For these reasons the decree appealed from is affirmed.

(A copy teste.)

GEO. K. TAYLOR,
C. C.

APPENDIX "B."

In another case, not yet reported, the Virginia Supreme Court of Appeals, on November 22, 1900, said:

"Conceding that the act approved March 5, 1890 (Acts 1889-90, pp. 170-1), entitled 'An Act relating to building and loan associations not incorporated in the State,' made it the duty of such an association to file with the Secretary of the Commonwealth a certified copy of the amendments to its charter and articles of incorporation, made after it commenced to do business in this State, as well as its charter or articles of incorporation in force prior to that time, it does not, we think, affect the rights of the parties in this case. That act makes it a misdemeanor, punishable by a fine of one hundred dollars, for any agent, officer or employee of such an association to do business in this State without complying with the provisions of the act, but it does not declare in terms that contracts made in violation of the act shall be void; nor is there anything in the act which

shows that it was the intention of the Legislature that they should be void. In the absence of any such intention, the rule seems to be well settled that such contracts will be enforced by the courts (Neimeyer *v.* Wright, 75 Va., and Cases cited; 2 Morawetz on Corp., Sec. 665 (2d Ed.))."

Eastern B. & L. Association *v.* Snyder, Supreme Court of Appeals of Virginia.

No. 153.

1856

Supreme Court of the United States.

OCTOBER TERM, 1900.

No. 153.

H. L. BEDFORD AND LOU M. BEDFORD, HIS WIFE,
APPELLANTS, PETITIONERS,

vs.

EASTERN BUILDING AND LOAN ASSOCIATION OF SYRACUSE, NEW YORK, APPELLEE.

Waiver of Personal Decree Against Lou M. Bedford.

The appellee herein hereby waives any and all claims and demands against the appellant Lou M. Bedford arising out of or based upon the decree in this cause in the court below so far as it adjudges her personally liable to appellee, and hereby stipulates and agrees that an order or decree may be entered in this cause releasing her from said

liability upon such terms and conditions as to this honorable court may seem just.

This January 31, 1901.

EASTERN BUILDING AND LOAN ASSOCIATION, *Appellee*,
By WM. HEPBURN RUSSELL,
Its Counsel.

[Endorsed:] File No., 17558. Supreme Court U. S., October term, 1900. Term No., 153. H. L. Bedford *et al.*, petitioners, *vs.* The Eastern Building and Loan Association. Waiver of personal decree against Lou M. Bedford. Filed January 31, 1901.

Supreme Court of the United States.

No. 153.—October Term, 1900.

H. L. Bedford and Lou M. Bedford, his wife, Petitioners,
vs.
The Eastern Building and Loan Association of Syracuse, New York.

On writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

[April 22, 1901.]

This suit was brought in the Circuit Court of the United States for the Western District of Tennessee by respondent to foreclose a mortgage executed by petitioners. A decree was entered in favor of the respondent. (88 Fed Rep. 7.) There was an appeal taken to the United States Circuit Court of Appeals for the Sixth Circuit. From that court the case came here on certificate. Subsequently a writ of certiorari was issued.

The following are some of the material facts contained in the statement of the Circuit Court of Appeals. Other facts will be stated in the opinion:

"The Eastern Building and Loan Association of Syracuse, N. Y., is a corporation organized under the laws of the State of New York for the purpose and with the power of conducting a general building association business in New York and other States. Its plan of organization is similar to that generally adopted by such associations. Subscribers to its stock pay $1 initiation fee for each share of $100 and 75 cents per month as dues on each share and certain fines on default, and when the whole amount of dues and dividends paid in amount to $100, the holder is entitled to withdraw the same. Borrowing members receive par value of their shares in advance and secure their compliance with requirements as to dues, fines and interest by mortgage or otherwise. Prior to March 26, 1891, the association had a soliciting agent in Memphis, Tennessee, whose duty it was to solicit persons to become members of the association and to subscribe to its stock. The agent had no authority to accept applications for membership or subscriptions for stock but only the authority to transmit them by mail to the office of the company in Syracuse, New York, where they were accepted or rejected by the board of directors of the association. Three months after a person had subscribed for stock, and the stock had been issued to him, he was, by the by-laws of the association, permitted to apply for an advance of the nominal par value of his shares, or, in effect, a loan. This application was forwarded through the soliciting agent to the company at Syracuse, together with the certificate of stock, already issued, as a pledge and a statement of the value of the property which it was proposed to mortgage to secure the loan. The application was accompanied by a recommendation of what was called 'the local board' in regard to the wisdom of the loan. The local board consisted of certain stockholders

of the association living at the applicant's place of residence who had been elected by all the resident stockholders, and whose duty it was to advise the association at Syracuse concerning the value of the property offered and the character of the applicant. The local board had officers, one of whom was a treasurer, through whom members might, if they desired, forward payments due to the association at Syracuse, but the by-laws stated that in so doing the local treasurer was acting as agent for the stockholders and not for the association. Another by-law provided that all payments should be made to the secretary of the association at the home office in registered letter, express or money order or drafts."

On the second day of January, 1891, H. L. Bedford, one of the petitioners, then being a resident of Shelby County, Tennessee, made application in due form, and under seal, to become a member of the association, and subscribed for forty-six shares of instalment stock. He delivered the application to the soliciting agent of the association at Memphis, to be forwarded to Syracuse. He agreed in the application "to abide by all the terms, conditions and by-laws contained or referred to in the certificate of shares," and to comply with the rules and regulations of the association; and he appointed the secretary of the association as proxy to appear and vote on his shares.

On the 2d of February, 1891, the certificate of stock was issued by the association and sent to its soliciting agent at Memphis, who, a few days later, handed it to Bedford. The certificate was numbered 4,773, and stated the number of shares to be forty-six, and the amount $4,600; date of maturity, August 1, 1897. It certified that Bedford was thereby constituted a member of the association and holder of forty-six shares therein of $100 each. "The terms, conditions and by-laws printed on the front and back" of the certificate were made part of the contract, and it was stated "that this certificate of shares is issued to and accepted by the holder thereof upon the following express terms and conditions."

These conditions were substantially as follows:

The payments of a monthly instalment of seventy-five cents on each share until it matures or is withdrawn; a fine of ten cents per share per month for each month if the payment of the instalment shall be in arrears; declaring the stock non-forfeitable; providing for its sale at auction if the monthly instalments due thereon be in arrears for six months or more, and providing for the application of the proceeds of the sale and the payment of such instalments and accrued fines; the balance remaining, if any, to be paid to the member in whose name the stock stands at the time of sale. "If the stock brings no more than enough to pay the accrued fines and monthly payments, it shall be bid in by the association and cancelled, and the amount standing to the credit thereof in the loan fund shall be divided among the other shares as profits."

Further conditions of the stock were "(4) that members could withdraw their monthly instalments at any time by giving thirty days' notice, and

to receive six per cent. annual interest on all shares of six months' standing and up to two years; the third year, seven per cent.; any time after the third year and before maturity, eight per cent. (5) If a shareholder died, his personal representative could continue or withdraw his share. (6) At stated periods the profits arising from interest, premiums, fines and other sources shall be apportioned among the shares in good standing. (7) All payments were required to be paid to an authorized agent or sent to the secretary at the home office. (8) Reservation of a right in the association to make investigation prior to approval of claims. '(9) The by-laws of this association, which are attached to and endorsed hereon, are a part of this contract, and such by-laws and this certificate are to be construed together as part of the contract between the association and the shareholder.' (12) No shareholder to have an interest in the affairs, assets or funds of the association, except as above stated, or to assume liability except as hereafter described. (13) Upon the cessation or determination of the contract, all payments made thereon shall become forfeited to the association. (14) Actions to be brought within six months after filing proofs in the county of Onondaga, in the State of New York. (15) 'No agent has authority to change this contract, and the association assumes no liability for any statements not contained in its printed literature.'"

The certificate concluded as follows:

"Given under the seal of said association at Syracuse, New York, the second day of Feby., A. D. 1891.

H. H. Loomis, *President.*

[L. S.] Jno. W. Reynolds,
Secretary and Gen'l Manager."

On the 20th of March, 1891, Bedford made an application for a preference for an advance, which was forwarded through the same soliciting agent to Syracuse. Bedford described in detail the real estate upon which he proposed to give the association a mortgage. This application was approved May 18, 1891, by the board of directors at Syracuse. Bedford then applied on June 20 for the loan in the letter following:

"*Application for an Advance.*

To the Board of Directors of the Eastern Building and Loan Association of Syracuse, N. Y.:

"Gentlemen: At a regular meeting of your board, held May 18, 1891, having obtained the preference for an advance on forty-six shares of No. 4773 of your association, at a premium of ten per cent., I now respectfully request the advance be granted. I hereby agree to comply with the charter and by-laws of your association and all requirements defined by your committee of the board of directors.

H. L. Bedford, *Applicant.*

Witness: J. H. T. Martin."

This letter was accompanied by a mortgage to the association, duly executed and acknowledged by Bedford and wife before a notary in Shelby County, Tennessee, of the land in that county previously tendered as security. The mortgage had been duly recorded in Shelby County.

The defeasance clause of the mortgage recited among other things that the—

"grant is intended as security for the payment of the sum of fifty-six hundred eighty-three and $\frac{8}{100}$ dollars, the same being the principal, interest and premium of a loan from said association, which said loan was made pursuant to and accepted under the provisions of the by-laws of said association, and which said by-laws have been read by the mortgagor, H. L. Bedford, and are made a part of this contract, which said loan is evidenced and secured to be paid by seventy-eight (78) certain promissory notes of even date herewith, executed by the said H. L. Bedford, payable to the said association at its office in Syracuse as follows: One of each of said notes to be paid on or before the last Saturday of each and every month until all of said seventy-eight notes are fully paid, together with the interest, and each of said notes after maturity at the rate of six (6) per cent. per annum, payable semi-annually, until said notes are fully paid. And the said mortgagor, H. L. Bedford, for himself and his heirs, executors, administrators and assigns, hereby covenants and agrees with the party of the second part, its successors and assigns, to pay said principal, interest and premiums at maturity and the interest accruing on said notes after maturity, and all fines and penalties that may be imposed pursuant to the provisions of the constitution and by-laws of said association, and also to keep and perform all promises and engagements made and entered into with said association according to the true intent and meaning of its by-laws and articles of association. . . ."

The seventy-eight notes were all of the same tenor, *mutatis mutandis*, as the following:

"On or before the last Saturday of June, 1893, I promise to pay seventy-two and 86–100 dollars, (872 86–100,) to the order of the Eastern Building and Loan Association at its office in Syracuse, N. Y. Value received.
Bailey, Tenn., May 1, 1891. H. L. BEDFORD."

The business of the association in Tennessee had been lawful down to March 26, 1891, when the following act passed by the legislature of Tennessee went into effect:

"CHAPTER 122.

An act to amend chapter 31 of the Acts of 1877, declaring the terms on which foreign corporations organized for mining or manufacturing purposes may carry on their business and purchase, hold and convey real and personal property in this State, so as to make the provisions of said act apply to all foreign corporations that may desire to own property or to do business in this State.

"SEC. 1. Be it enacted by the General Assembly of the State of Tennessee, That chapter 31 of the Acts of 1877 be so amended and enlarged as that the provisions of said act shall apply to all corporations chartered

or organized under the laws of other States or countries for any purpose whatsoever which may desire to do any kind of business in this State.

"SEC. 2. Be it further enacted, That each and every corporation created or organized under or by virtue of any government other than that of this State, for any purpose whatever, desiring to own property or carry on business in this State of any kind or character, shall first file in the office of the secretary of the State a copy of its charter and cause an abstract of same to be recorded in the office of the register in each county in which such corporation desires or proposes to carry on its business or to acquire or own property, as now required by section 2 of chapter 31 of Acts of 1877.

"SEC. 3. Be it further enacted, That it shall be unlawful for any foreign corporation to do or attempt to do any business or to own or acquire any property in this State without having first complied with the provisions of this act, and a violation of this statute shall subject the offender to a fine of not less than $100 nor more than $500, at the discretion of the jury trying the case.

"SEC. 4. Be it further enacted, That when a corporation complies with the provisions of this act it shall then be, to all intents and purposes, a domestic corporation, and may sue and be sued in the courts of this State, and subject to the jurisdiction of the courts of this State just as though it were created under the laws of this State.

"SEC. 5. Be it further enacted, That when such corporation has no agent in this State upon whom process may be served by any person bringing suit against such corporation, then it may be proceeded against by an attachment to be levied upon any property owned by the corporation, and publication, as in other attachment cases. But for the plaintiff to obtain an attachment he, his agent or attorney, need only make oath of the justness of his claim, that the defendant is a corporation organized under this act, and that it has no agent in the county where the property sought to be attached is situated upon whom process can be served.

"SEC. 6. Be it further enacted, That said chapter 31 of the Acts of 1877, except in so far as the same is amended, enlarged and extended by this act, be and the same is declared to be in full force.

"SEC. 7. Be it further enacted, That this act take effect from and after its passage, the public welfare requiring it.

"Passed March 21, 1891."

Upon the same date an act was passed concerning building associations. The part thereof relating to foreign building associations was as follows (Chapter 2 of the Acts of 1891):

"SEC. 3. Be it further enacted, That no building and loan association organized under the laws of any other State, Territory or foreign government, shall do business in this State unless said association shall (deposit and continually thereafter) keep deposited in trust for all of its members and creditors, with some responsible trust company or with some State officer of this or some other State of the United States, mortgages (or other securities) received by it in the usual course of its business amounting to not less than twenty-five thousand ($25,000) dollars nor more than fifty thousand ($50,000) dollars, at the discretion of the State treasurer. All of the personal obligations of its members taken in the ordinary course of business of such association and secured on first mortgage on real estate, all dividends and interest which may accrue on securities held in trust, as

aforesaid, by the trust company or the State, as provided herein, and all dues or monthly payments which may become payable on stock pledged as security for loans, the mortgages for which are on deposit in accordance with the provisions of this act, may be collected and retained by the association depositing such securities or mortgages so long as such association remains solvent, and faithfully performs all contracts with its members. Any securities on deposit, as provided herein, may from time to time be withdrawn, if others of equal value are substituted therefor. Every building and loan association organized under the laws of any State, Territory or foreign government shall, before commencing to do business in this State—

"First. File with the treasurer of this State a duly authenticated copy of its charter or articles of corporation.

"Second. File with the treasurer of this State the certificate of the proper State officer of another State or the president and treasurer of some responsible trust company certifying that it has on deposit securities, not less than $25,000, taken in the regular course of business as mentioned in this act, in trust for all the members and creditors of such building and loan association.

"Third. File with the State treasurer a duly authenticated copy of a resolution adopted by the board of directors of such association stipulating and agreeing, that if any legal process affecting such association be served on said State treasurer, and a copy thereof be mailed, postage prepaid, by the party procuring the issuing of the same, or his attorney, to said association, addressed to its home office, then such service and mailing of such process shall have the same effect as personal service on said association of this State.

"Fourth. Pay the State treasurer twenty-five (25) dollars as fees for filing the papers mentioned in this section.

"SEC. 7. Be it further enacted, No officer, director or agent of any foreign building and loan association shall, in this State, solicit subscriptions to the stock of such association, or sell, or knowingly cause to be sold or issued, to a resident of this State any stock of an association while said association has not on deposit securities as required by section 3 of this act, or before said association has complied with all the provisions of this act. License to agents of such companies or associations shall be issued by the treasurer annually, on the first of January, and said treasurer is authorized to collect from each agent for said license $2 fee. Any violation hereof shall be deemed a misdemeanor, and upon conviction shall be punished by a fine of not less than ten dollars or more than fifty dollars."

The association filed its charter with secretary of State of Tennessee on the 11th day of August, 1893, and filed an abstract of the same in the office of the register of Shelby County on August 15, 1893. The association did not comply with the building association laws quoted above in any respect.

There is no evidence that the association solicited stock subscriptions after March 26, 1891, but it does appear that it made several loans of the same kind as the Bedford loan upon stock already subscribed for after that date.

The Supreme Court of Tennessee has decided that notes and a mortgage executed under similar circumstances and made payable in Minnesota are Minnesota contracts, but that they are, nevertheless, void in Tennessee and cannot be enforced in the courts of Tennessee. (*United States Saving & Loan Company* v. *Miller*, 47 Southwestern Rep. 17, affirmed on appeal by the Supreme Court of Tennessee, December 18, 1897, without written opinion.)

Bedford defaulted in his payments on the notes, and the association filed a bill in equity in the Circuit Court of the United States for the Western District of Tennessee to foreclose the mortgage and collect the amount due under his contract. The defendant Bedford answered, averring that the notes and mortgage were in violation of the above quoted laws of Tennessee, and were void and could not be enforced.

Mr. Justice McKenna, after stating the case as above, delivered the opinion of the Court.

The assignments of error, except one, present the question of the enforceability of the notes and mortgage under the Tennessee law, or, as the question may be put, whether there was a contract between the parties—a right in one and an obligation in the other arising from a consideration given and received; mutual covenants by which each party acquired the right to that which the other promised or engaged to do, and whether the laws of Tennessee, as interpreted by its courts, impaired that right?

(1.) A recapitulation of the facts in this connection will be useful. The Eastern Building and Loan Association was organized under the laws of New York, and one of its purposes was to make "advances" to members. It had a capital stock of $50,000, divided into shares of $100 each. The funds of the association were divided into two classes—a loan fund and an expense fund. The articles of incorporation provided that "the loan fund shall consist of all receipts which do not go into the expense fund, as hereinbefore provided, together with all interests and accumulations from whatever source. No money can be drawn from the loan fund for any other purpose than the making of loans on security, as provided by the by-laws, and to pay amounts due withdrawing shareholders. The funds of the association not required for advances on shares may be invested by the board of directors in such securities as the savings banks of the State of New York are permitted to take, or deposited at interest in the savings banks, trust companies or duly incorporated banks of said State, and which are in good standing."

The articles of incorporation and the by-laws also provided the manner of becoming a member of the association, the rights of a member and the obligations of the association. The entrance fee of new members and new shares were to be one dollar per share, monthly dues seventy-five cents,

fines for non-payment of dues on unpledged stock twenty cents. And it was provided by sections 1 and 2, article XIX, under the heading "Contract of members," as follows:

"SEC. 1. The terms and conditions expressed in the certificate of stock, in connection with the application for membership and the by-laws of the association, from the contract between the association and each shareholder therein.

"SEC. 2. All persons desiring to become shareholders of this association must fill out, sign and deliver to the secretary an application according to the form adopted by the association, which said application shall be a part of said application with this association. Such applicant shall also pay a membership fee of one dollar per share for each and every share held by him.

* * * * * *

"SEC. 16. All remittances for advance, instalments, premiums, monthly instalments, fines and penalties, interest and premiums, and all other payments shall be made to the secretary of the association at the home office, and in registered letter, express or money order or drafts. Individual checks shall not be received."

The other sections of the article provide for the manner in which the loan shall be made, upon what security, interest and premium and covenants, the manner of payment and prepayment, and the enforcement of payment and when shares may be cancelled and forfeited. "Punctuality and strict performance on the part of all members, borrowers and shareholders, in payment of fines, dues, interest, loans and premiums, are made the essence of the contract."

The articles also provide with what the stock shall be charged and to what it shall be subject, the amount of monthly instalments to be paid and when paid, and when and to what extent and upon what terms shares may be withdrawn and for the issue of paid up stock.

Article XV of the by-laws is as follows:

"Loans.

"SEC. 1. Each shareholder, for each share named in their certificate, shall be entitled to a loan of one hundred dollars from the association, provided they shall first make application for such a loan upon a blank furnished by the association for that purpose, if the condition of the loan fund in the treasury shall warrant it. All applications for loans shall be filed and numbered consecutively as received, and be examined and approved, or rejected, by the board in their regular order.

"SEC. 2. All shares must be in force three months before said shareholder shall be entitled to a loan. All applications for loans are part of the contract of the shareholders with this association. Nothing herein contained shall prevent the board of directors from loaning funds of the association to any member in greater sums than the above provided upon approved securities."

On the 2d of January, 1891, Bedford applied to become a shareholder of the association, and subscribed for forty-six shares of instalment stock.

The application was accepted and a certificate of stock was issued to him on the 2d of February, 1891, and on the 20th of March, 1891, he presented a written application for a loan as follows: "——— ——— do hereby make application for a loan of forty-six hundred ($4,600.00) dollars, for six and a half years, to bear interest at the rate of five per cent. per annum, and a premium of five per cent. per annum, payable on or before the last Saturday of each month;" and to secure the sum agreed to give a mortgage on the real estate set forth in certain questions and answers which accompanied the application, which described with particularity the real estate and the improvements thereon, and stated that the loan was "for investment to relieve adjoining property." The property was stated to be of the value of $6,000, and all of his property easily to be worth $40,000. The application was sworn to and accompanied by the affidavit of three other persons that they regarded Bedford "as a prompt, upright, reliable person, pecuniarily responsible for his contracts."

The application and report of the local board of appraisers was received by the association on the 12th of May, 1891, by mail from H. B. Martin, the soliciting agent of the association. It was accepted and a loan granted on the 18th of May, and to secure the same the notes and mortgage in suit were subsequently executed.

The statutes of Tennessee relied on as a defense were passed March 26, 1891, and to repeat, the question is, did the subscription to the stock of the association, its issuance and the application for a loan in pursuance of it, constitute a contract which was inviolable by the State legislature? We think the answer should be in the affirmative. By his subscription to stock of the association Bedford became a member of the association—bound to the performance of what its by-laws and charter required of him, and entitled to exact the performance of what the by-laws and charter required of the association. Each acquired a right to what the other promised, and there were all the elements of a contract. We are compelled, therefore, to disagree with the views expressed by the Supreme Court of Tennessee, in *New York &c. Building & Loan Association* v. *Cannon*, (99 Tenn. 344,) notwithstanding our high respect for that learned tribunal. It was there contended that "Cannon, having become a stockholder in the association before the acts were passed, with a view to becoming a borrower, and for that purpose, and having made his application for a loan likewise before the acts passed, acquired a vested right to the consummation of the loan, and the association became legally obligated to complete it, and it was also unfinished business, which the association had a right, and which was its duty, to finish, notwithstanding the acts of the legislature." To this contention the court replied: "If we were to grant that the borrower had a vested right to the loan, and the association had a

legal obligation to consummate it, still, it must follow that the contract could be entered into, and the loan and mortgage made, only in compliance with the law. There was nothing to prevent the association from complying with the statutes and thus placing itself in the attitude where it could legally make the loan and take the mortgage if it were under obligation to do so, as it claims."

And the court observed that it could not be considered that the association and Cannon were winding up an old transaction and unfinished business, but were doing business in the sense of the statute and in defiance of its prohibition, and refused to enforce the mortgage of the association. We cannot assent to the view that there is nothing to prevent the association from complying with the statutes. The mere filing of its charter in a particular office—the secretary of State's or some other office—might be easily complied with, but the deposit with some responsible trust company or State officer of the State or some other State, mortgages or securities of from $25,000 to $50,000 in amount, at the discretion of the State treasurer might be impossible to comply with. At any rate, the requirement is so very onerous that the association could justly decline to do business in the State on that condition. It might indeed have the right to decline any condition and retire from the State, and from all it had the option to retire from. But it could not retire from the execution of its contracts. It contracted with Bedford to make him a loan if it had the means in its treasury and his security was good. The State could not affect that obligation nor impair it. "The obligation of a contract 'is the law which binds the parties to perform their agreement.'" (4 Wall. 452.) The building association was incorporated under the laws of New York to make loans to its members, and rights to a loan accrued to membership. The condition of a loan existing—means in the treasury, a tender of good security—the contingent right became a vested one, a contract was formed, and, can there be a doubt, that it was enforceable against the association? If it could have been enforced by suit, it was properly yielded to without suit and possessed all legal sanctions.

We recognize the power of the State to impose conditions upon foreign corporations doing business in the State. We have affirmed the existence of that power many times, but manifestly it cannot be exercised to discharge the citizens of the State from their contract obligations.

It is claimed, however, that if the transactions between Bedford and the association were otherwise legal they were affected with usury, and to the extent that they were usurious they were unenforceable. The contention is that in making the loan of $4,600 Bedford was required to pay a fixed premium of $460, and received only $4,140, and that this constituted usury in Tennessee. This is made out because, it is said, Bedford was required to withdraw his stock and receipt in full, and could therefore get

no benefit from future profits of the association; and, it is asserted, that thereby the loan became "fixed and certain and no element of contingency" remained, and the transactions are withdrawn from the principle expressed in *Spain* v. *Hamilton*, (1 Wall. 604,) that "where the promise to pay a sum above legal interest depends upon a contingency, and not upon the happening of a certain event, the loan is not usurious." But the fact was not as asserted.

The stock was pledged as security for the advance, and the pledge was no more a withdrawal of the stock, terminating Bedford's ownership of it, than his mortgage was an absolute conveyance of his land. It is provided in section 3, article 19, that in addition to real estate security for a loan a shareholder shall "transfer in pledge to the association one share of the stock held by said shareholder, as *collateral security*, on all loans made by the association" to him. Besides, the transactions were not usurious under the laws of New York, where the notes were payable. (*Concordia Savings &c. Association* v. *Reed*, 93 N. Y. 474.) Therefore, the principle expressed in *Miller* v. *Tiffany*, (1 Wall. 298,) applies. It was said in that case: "The general principle in relation to contracts made in one place to be performed in another is well settled. They are to be governed by the law of the place of performance, and if the interest allowed by the law of the place of performance is higher than that permitted at the place of contract, the parties may stipulate for the higher interest without incurring the penalties of usury. The converse of this proposition is also well settled. If the rate of interest be higher at the place of the contract than at the place of performance, the parties may lawfully contract in that case also for the higher rate." See also *Anderson* v. *Pond*, (13 Pet. 78;) *Railroad Company* v. *Bank of Ashland*, (12 Wall. 226;) *Scotland County* v. *Hill*, (132 U. S. 107;) *Cromwell* v. *County of Sac*, (96 U. S. 57;) *Cockle et al.* v. *Flack et al.*, (93 U. S. 344.)

In *Pioneer &c. Loan Co.* v. *Cannon*, (96 Tenn. 599,) a note secured by mortgage was given to a building association and made payable at Minneapolis. It provided for the payment of five per cent. interest per annum, a five per cent. premium per annum, monthly, on or before the last Saturday of each month, and stipulated, further, that "any failure to pay interest or premium, when due, shall, at the election of the payee, make the principal, interest and premium at once due." Of the note and mortgage the court said: "The second assignment of error is that the note and mortgage were both usurious on their faces and nonenforceable. As already stated, the note stipulates on its face to pay five per cent. interest per annum, at the office of the company at Minneapolis, Minn. This contract is a Minnesota contract, and is expressly authorized by the charter of the company and the laws of that State, which have been distinctly proved, and appear on the record." The assignment of error was held not well taken.

The Circuit Court adjudged Mrs. Bedford personally liable for the indebtedness to the association. This is conceded to be error, and it has been stipulated "that an order or decree may be entered in this cause releasing her from said liability upon such terms and conditions as to this court may seem just."

The judgment of the Circuit Court will be modified in accordance with the stipulation, and, as modified, affirmed. Costs are awarded to Mrs. Bedford on her appeal to and in the Circuit Court of Appeals and in this court.

True copy.

Test:

Clerk Supreme Court, U. S.